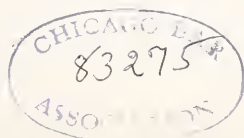


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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 17 day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 8

ERROR TO  
APPEAL FROM

Charles R. Bateh  
Appellant

vs.

No.

20

March Term, 1915

Circuit COURT

Randolph COUNTY

J. W. Rudloff et al  
Appellees

TRIAL JUDGE

HON.

W. E. Hadley



March Term, 1913.

Charles H. Bartels,	)	
Appellant,	)	
vs.	)	Appeal from Randolph.
J. W. Rudloff, Et. Al.,	)	
Appellee.	)	

Opinion by Higbee, J.

Appellant, Charles H. Bartels caused an attachment writ to be issued and levied on the personal property of the appellee J. W. Rudloff, charging in his affidavit that said Rudloff was about to depart from the State of Illinois with the intention of having his effects removed therefrom and that within two years last past, he had fraudulently conveyed and assigned his effects so as to hinder and delay his creditors. Appellees, August Rudloff and Ed. Rudloff the brother and father of appellee, J. W. Rudloff, filed an interpleader in the suit, claiming the property attached under a chattel mortgage executed to them by J. W. Rudloff, to secure an indebtedness of some \$3200. Upon the trial of this case the parties waived a jury and the court, having heard the proofs found against J. W. Rudloff for the amount of appellant's debt, amounting to \$3588.68 and gave judgment against him for that amount, awarding execution therefor, but found in favor of the interpleaders

Page 10.37

Appellant, Charles A. Lister, was an  
attorney at law, residing in the city  
of St. Louis, Missouri, and was the  
owner of the property of the appellee,  
J. A. Lister, Jr., who was the  
son of the appellant.

Statement of Facts.

Appellant, Charles A. Lister, was an  
attorney at law, residing in the city  
of St. Louis, Missouri, and was the  
owner of the property of the appellee,  
J. A. Lister, Jr., who was the  
son of the appellant. The appellee  
was a minor, and the appellant was  
his guardian. The appellee was  
born on the 1st day of January, 1891,  
in the city of St. Louis, Missouri,  
and was the son of the appellant.  
The appellee was a minor, and the  
appellant was his guardian. The  
appellee was born on the 1st day of  
January, 1891, in the city of St.  
Louis, Missouri, and was the son  
of the appellant. The appellee was  
a minor, and the appellant was his  
guardian. The appellee was born on  
the 1st day of January, 1891, in  
the city of St. Louis, Missouri,  
and was the son of the appellant.



on the attachment issued and entered an order quashing the writ of attachment and directing that the property levied upon under said writ, be released. From this order and judgment the plaintiff below has appealed.

\* Plaintiff ~~Appellant~~ <sup>defendant</sup> was a banker and land owner residing in St. Mary, Missouri and owned a farm on Kaskaskia Island in Randolph County, Illinois, across the Mississippi river. J. . Rudloff had been a tenant on this farm for a number of years handling stock and grain with his landlord.

Plaintiff Appellant had taken up a mortgage against his <sup>the</sup> tenant and through their various transactions a <sup>large</sup> indebtedness had accumulated against him in favor of ~~appellant~~ <sup>plaintiff</sup>, amounting to \$3588.68. In the latter part of November, 1913, the parties at

tempted to come to a settlement as to the amount due ~~appellant~~ <sup>plaintiff</sup> and failing to do so entered into

an agreement <sup>to</sup> that the matter be submitted to the <sup>the latter</sup> said August Rudloff and Ed Rudloff, the interpleaders and John W. Bartels, a brother of

~~appellant~~ <sup>plaintiff</sup>, as arbitrators; it was further agreed that whatever amount the arbitrators found due <sup>to plaintiff</sup> should be immediately paid or secured to ~~appellant~~ and that possession of the premises should be surrendered, to him, by said J. W. Rudloff. This agreement

to submit to arbitration was dated November 26, 1913, but it appears to have been executed by Rudloff on November 30 at which time a meeting of the proposed arbitrators was held. At this meeting <sup>which</sup> the accounts of the parties were gone over but no

on the attachment issued and entered in order  
pursuing the writ of attachment and directing  
that the property levied upon under said writ, be  
released. In this order and judgment the

plaintiff below was specified.  
~~Defendant was a banker and land owner~~  
residing in St. Louis, Missouri and owned a farm  
on Laskaskia Island in Randolph County, Illinois,  
across the Mississippi river. J. J. Hoff had  
been a tenant on this farm for a number of years  
handling stock and grain with his family.

Defendant had taken up a mortgage against his  
tenant and through their various transactions a  
large indebtedness had accumulated against him  
in favor of plaintiff, amounting to \$3,858.63. In  
the latter part of November, 1913, the parties ar-  
ranged to come to a settlement as to the amount  
due plaintiff and failing to do so entered into  
an agreement that the matter be submitted to the  
said J. J. Hoff and J. Hoff, the inter-

pleaders and John L. Bartels, a brother of  
plaintiff, as arbitrators; it was further agreed  
that whatever amount the arbitrators found due should  
be immediately paid or secured to plaintiff and  
that possession of the premises should be given  
thereby said J. J. Hoff. This agreement  
to submit to arbitration was dated November 25,  
1913, but it appears to have been executed prior  
to the date of the arbitration meeting. The  
proposed arbitrators were J. J. Hoff, J. J. Hoff  
the accounts of the parties were reviewed and no

~~the~~ ~~conclusion~~ ~~was~~ ~~reached~~ ~~at~~ ~~stipulation~~ ~~of~~  
~~and~~ ~~an~~ ~~order~~ ~~was~~ ~~made~~ ~~for~~ ~~the~~ ~~to~~  
account made, ~~and~~ ~~the~~ ~~parties~~ ~~appeared~~ ~~to~~ ~~meet~~  
on December 2. ~~At~~ ~~the~~ ~~last~~ ~~named~~ ~~date~~ ~~the~~ ~~parties~~  
~~did~~ ~~not~~ ~~appear~~ ~~and~~ ~~the~~ ~~arbitration~~ ~~was~~ ~~not~~ ~~in~~ ~~attendance~~ ~~so~~  
~~that~~ ~~the~~ ~~arbitration~~ ~~was~~ ~~not~~ ~~conducted~~ ~~and~~ ~~the~~ ~~arbitration~~ ~~was~~ ~~not~~ ~~conducted~~  
but the arbitrators failed to sit together after  
that time ~~and~~ the arbitration was never concluded.

On November 26th, 1913, J. M. Ludloff executed a  
note for \$3200 ~~and~~ <sup>on</sup> one year ~~after~~ <sup>date</sup>, payable  
to the order of ~~and~~ <sup>which</sup> August Ludloff and Ed  
Ludloff, with interest at seven per cent ~~per~~  
~~annum~~ ~~from~~ ~~date~~, ~~and~~ <sup>which</sup> ~~to~~ <sup>be</sup> secured ~~by~~ <sup>the</sup> ~~same~~ <sup>party</sup> gave a  
 chattel mortgage to the ~~same~~ <sup>parties</sup> on ~~his~~ <sup>personal</sup> ~~property~~. The note and mortgage ~~for~~ <sup>some</sup>  
~~reason~~ were not satisfactory and on December 1,  
he executed a new note, <sup>to the interpleaders</sup> for the same amount and a  
new mortgage covering the same property to ~~said~~  
interpleaders. This mortgage was recorded ~~on~~ <sup>Dec-</sup>  
ember 5th and a day or two thereafter, the note  
was delivered to Ed. Ludloff. ~~On~~ <sup>December</sup> 13  
following <sup>plaintiff</sup> ~~discovered~~ <sup>that</sup> ~~said~~  
~~property~~ ~~had~~ ~~been~~ ~~mortgaged~~ ~~to~~ ~~the~~ ~~interpleaders~~  
and that the arbitration had been apparently  
abandoned filed his affidavit for attachment ~~as~~  
~~above~~ ~~set~~ ~~forth~~. There was no proof that J. M.  
Ludloff was about to depart <sup>from</sup> the state of ~~Ill-~~  
~~inois~~ with the intention of ~~moving~~ <sup>removing</sup> his effects  
removed therefrom, ~~and~~ the only question of fact  
upon the attachment issued, was whether the ~~taking~~  
of the chattel mortgage by him to his father and

*[The page contains extremely faint, illegible text, likely bleed-through from the reverse side.]*



brother constituted a fraudulent conveyance and assignment of his effects for the purpose of hindering and delaying his creditors.

It is a well known rule of law that a debtor in failing circumstances, who does not seek the benefit of the general assignment act, may prefer one creditor to the exclusion of others when he does so in good faith. *Hulse v. Mershon*, 125 Ill. 52. *Schroeder v. Walsh* 120 Ill., 403. It has also been held that such debtor, if acting in good faith, may secure certain creditors to the exclusion of others, even though such preference will operate to that extent to hinder and delay his general creditors. *Welson v. Teiter* 190 Ill., 414. The proof was ample that J. W. Audloff was indebted to the interpleaders in good faith in the amount secured by the note and mortgage and that question is not seriously disputed, but it is contended by appellant, that as the interpleaders were acting as arbitrators in the dispute between appellant and J. W. Audloff, they had no right to secure their own debt by taking a mortgage on his property and that in doing so they were guilty of a fraud which made the transaction void and rendered the property subject to attachment by other creditors. Appellant cites authorities holding that arbitrators must be held to the highest degree of good faith; that they must have no secret interest in the subject matter of dispute; that indebtedness of a party to any of the arbitrators may unfit such arbitrator to act in the matter submitted; that

...better constituted a fraudulent assignment and  
assignment of the effects for the purpose of insur-  
ing and delaying the creditors.  
It is a well known rule that a debtor  
in failing circumstances, who does not seek the  
benefit of the general assignment act, and prefer  
one creditor to the exclusion of the others,  
does so in good faith. *Wells v. Bishop*, 125 Ill.  
2d, 400 (1898). It has  
also been held that such a debtor, if acting in good  
faith, may secure certain creditors to the exclu-  
sion of others, even though such preference will  
operate to that extent to hinder and delay the  
general creditors. *Wells v. Bishop*, 125 Ill. 2d, 400.  
The court was aware that the debtors were indebted  
to the intervenors in good faith in the amount  
secured by the note and mortgage and that creditors  
are not seriously injured, but it is contended by  
appellant that as the intervenors were acting  
as arbitrators in the dispute between appellant  
and the debtors, they had no right to secure their  
own debt by taking a mortgage on the property in  
that in doing so they were guilty of a fraud which  
made the transaction void and rendered the property  
subject to attachment by other creditors. Appellant  
cites authorities holding that arbitrators must  
be held to the highest degree of good faith;  
that they must have no secret interest in the sub-  
ject matter of dispute; that arbitrators are bound  
to act in the best interests of the parties to the  
dispute.

arbitrators are like jurors and their conduct must be clean in every respect. The above doctrine laid down in the authorities relied upon by appellant, is so correct and self evident that few persons, if any one would seek to dispute it, and in this case if the award had been made by the arbitrators and the same had been attacked by appellant, he could have properly invoked the rules above laid down against the award, but these rules apply only to the action of arbitrators, as such, in acting upon matters submitted for arbitration and making an award. In this case no arbitration was concluded and no award made, so that the matter of arbitration stood as though no agreement therefor had ever been entered into and the arbitrators occupied the same relation to appellant as though they had not been selected for such arbitration. They therefore had the same right to secure the indebtedness due them from J. W. Ludloff that his other creditors had. His indebtedness to the interpleaders appears to have been honest in all particulars and his mortgage to them seems to have been made in good faith to secure such indebtedness and should not be held to be a fraudulent conveyance of his effects to hinder and delay creditors within the meaning of the attachment act.

We are of opinion the finding of the trial court sustaining the rights of the interpleaders and the judgment quashing appellants writ of attachment were correct and that such judgment should be affirmed.

Judgment affirmed.

Not to be reported in full.

1972-1973

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THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION  
PUBLISHED WEEKLY  
CHICAGO, ILL., U.S.A.  
Subscription price, Five Dollars Per Annum in Advance  
Single Copies, Fifteen Cents  
Entered as Second-Class Matter, October 3, 1917  
Postpaid  
Acceptance for mailing at special rate of postage provided for in Act of October 3, 1917  
Authorized Second-Class Mail Matter  
Postage paid at Chicago, Ill.  
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Printed at the American Medical Association, 535 North Dearborn Street, Chicago, Ill.  
Second-Class Bulk Rate Approved  
Postage paid at Chicago, Ill.  
Postmaster: Send address changes in this journal to THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 535 North Dearborn Street, Chicago, Ill. 60610

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noted that at approximately 11:00 a.m. on 10/11/90, the first of two

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... it is not possible to ...

been made in our faith to receive it.

and should not be held to be a fraudulent conveyance.

100-443887-100

"Within the month, if the situation is not

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THE NATIONAL ARCHIVES COLLEGE PARK, MARYLAND

the subject of the Committee's report.

the correct and best method for the

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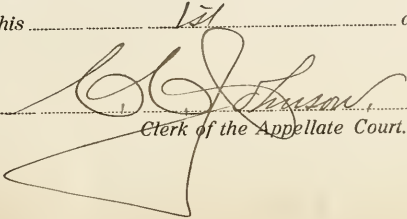
Figure 1. *Staphylococcus aureus* strains.

...ni betraget ad et tot



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# OPINION

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197A11

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

J. J. Kenner,

Appellee.

vs.

No. 33

March Term, 1915

St. Louis, Iron Mountain &

Southern Railway Company,

Appellant.

197 I.A. 11

~~ERROR TO~~  
APPEAL FROM

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON. W. L. Hadley.



March Term, 1915.

J. J. Henner,	)
Appellee	)
vs.	) Appeal from Randolph.
St. Louis, Iron Mountain &	)
Southern Railway Company,	)
Appellant.	)

Opinion by Ligbee, F. J.

Appellee, J. J. Henner, a tenant of William Ufflemann, brought this suit for injuries to crops growing on the land rented by him for the years 1910, 1912 and 1913. There was a verdict in favor of Henner for \$1162, followed by a judgment for a like amount. Previous to the bringing of the present suit, appellee's landlord brought suit against appellant to recover damages for injury to the rental value of the same lands for the years 1909 to 1913 inclusive. He obtained a judgment in his favor in the circuit court and an appeal from the same was prosecuted by the railway company to this court. In that case an opinion was filed in this court at the March term, 1915 (Ufflemann vs. St. Louis Iron Mountain & Southern Railway Co. 111. App. ) reversing the judgment and remanding the cause. In the opinion handed down in that case,

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Opinion by Judge, 1911

Opinion by Judge, 1911

we held that as the suit was for rental values only there could be no recovery by the landlord, for the reason that the title to the crop was in the tenant until delivered or paid to the landlord.

\* *Plaintiff*  
~~Appellee~~ rented the land in question from year to year,, commencing in 1909 and paying as rent one third the crops, except the hay of which he paid one half. The farm consisted of ~~some~~ *about* 259 acres and was intersected by ~~appellant's~~ *defendants'* railroad, leaving 200 acres thereof north ~~each~~ *East* of the right of way, ~~to the bluff~~. The natural slope of this 200 acre tract is towards the railroad and through it Redoc creek flows in a southwesterly direction passing under ~~appellant's~~ *defendants'* track and into a slough some 500 feet on the other side, ~~thereof~~. This slough ~~clearly~~ *defendants'* parallels ~~appellant's~~ right of way and carries the water about two miles further on where it empties into the Mississippi river. Redoc creek formerly spread over all this land but before the railroad was constructed the channel was cleaned out and straightened. Since the construction of the railroad overflow channels have also been dug and all the water gathered by the channel flows under the railroad track and into the slough through three openings provided therefor by appellant, the main one being 39 feet long 13 feet wide and some three feet deep. The ~~railroad~~ embankment across the land in question, upon which the rails are laid, is ~~some~~ *about* three and a half feet in height. *Plaintiff*  
~~Appellee~~ claims *defendants'* that by reason of the maintenance of ~~appellant's~~



[illegible]



~~railroad~~ ~~embankment~~, the improper construction of  
the outlets under <sup>it</sup> ~~the same~~ and the fact that ~~brush~~  
and other materials were permitted to lodge in and  
fill up the outlet, the water intimes of heavy  
rains was held back <sup>and destroyed</sup> ~~on his crops and destroyed the crops~~  
~~same~~; that while the water went over the land be-  
fore the construction of the embankment it passed  
off in a few hours and did no injury but that afterward  
it would remain thereon for a day or so ruining  
the crops it covered.

~~Appellant claimed~~ <sup>defendant</sup> ~~a defense~~ that before the  
embankment was built the land in question was low,  
wet, marshy and unfit for cultivation and that no  
crops could have been raised on it except in exces-  
sively dry years; that by the washing down of silt  
and soil from the bluffs, which filled in east of  
the railroad, ~~said tract of~~ <sup>the</sup> land was improved in-  
stead of injured; that part of the overflow and  
damage was caused by a failure on the part of appellee  
to keep <sup>open</sup> the ~~ditches located~~ <sup>on</sup> the land; ~~open~~  
that ~~appellee~~ <sup>plaintiff</sup> is not entitled to recover ~~for injuries~~  
~~to his crops for the reason that~~ <sup>because</sup> at the time he rent-  
ed the land in question and from year to year there-  
after, upon the renewal of his lease, he was fully  
advised ~~and knew~~ of the existence of the ~~railroad~~  
embankment and ~~with~~ the conditions relating to ~~the~~ <sup>it</sup>  
~~same~~. ~~There were~~ <sup>will</sup> ~~a~~ number of witnesses produced  
by the parties to ~~prove their respective claims and~~  
~~the testimony was conflicting and at great variance.~~



We do not think it necessary to review the evidence in detail, but will only say that upon consideration of the case, we find it was sufficient to warrant the jury in finding that the openings through appellant's railroad embankment were insufficient to carry off the water coming from the higher ground within a reasonable time; that by reason of such embankment the water was held back upon the track of land in question and the crops ruined by the overflow. There was but little controversy as to the amount of appellee's loss. He confined his proof to two thirds of the total loss claiming only the amount which would be coming to him as tenant. The proof made by him showed his loss to be \$1970, while the verdict was for only \$1162. Appellant insists that the cases of McConnell v. Hibbe 33 Ill. 172 and Hunston v. Hoffman 232 Ill. 360 sustained its theory that appellee, knowing the existence of the embankment and the conditions surrounding it and the injury to crops likely to occur, could not renew his lease from year to year and recover damages for injuries occasioned to his crops by overflow. In the McConnell case where an injury was done to a building while the party had a lease-hold interest therein, it was held that the holder of such interest had a right of action for the portion of the damages he had sustained, but that if the premises were leased after the wrongful act was done, the lessee could not recover any damages caused thereby; and in

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the case of Lunston vs. Hoffman, supra, it was held, that a tenant from year to year, who renewed his lease, after an adjoining land owner had taken up his tile with which the leased land was connected and knowing how such action had already damaged the crops on the lands leased by him, could not recover from such adjoining owner for injury to the crops occasioned by said cause, during the year for which the lease was renewed. This rule however, does not appear to apply in cases where railroads are concerned, as they are controlled by a special statute upon the subject. Appellant's road was constructed at the place in question in 1901 and 1902. In 1891 an act was passed by the General Assembly of this state authorizing the incorporation of railroads, and in clause 5 of section 19<sup>8108754</sup> of said act, it was provided that "In no case shall any railroad company construct a road bed, without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof".

In Tetherington vs. St. Louis, Troy & Eastern R. R. Co. 226 Ill. 129, which was a suit by Tetherington to recover damages to his land by an overflow caused through the erection of its railroad embankment, along its right of way, the supreme court in its opinion, while recognizing the rule that where a party comes into possession of lands as grantee or lessee, with an existing nuisance upon them, he cannot be held liable to an action for



[illegible]

damages until he has been first notified to remove them, states that this rule of law with reference to nuisances has been changed by the section of the law above referred to, in so far as it is applied to railroads constructed after the passage of the act. It is further said in reference to said section, "It is a public law, and in positive and express terms prohibits any railroad company, after the passage of the act, from constructing its road until it shall have provided all necessary culverts and sluices to take care of the water which naturally drained through the land covered by the right of way. The performance of that duty became a condition precedent to the building of the railroad.... The burden, under such circumstances, is upon the defendant to affirmatively show facts excusing the failure to comply with the statute." In *Ramey vs. U. S. R. R. Co.*, 235 Ill. 502, which was a case similar to this, the same question was raised, which we have under discussion here, and it was there ~~xxx~~ said by the court, "It is also contended that plaintiffs could not recover and the court ought to have directed a verdict for the reason that they leased the farm from year to year, and the renewals for the years 1905 and 1906 were made with full knowledge of the condition of the trestle, track and ditch. The duty of a railroad company to so construct and maintain its road across a stream as not to injure adjacent land by throwing water back upon it is a

The duty of a railroad company is to maintain its road in a safe condition for the use of the public. It is not its duty to maintain its road in a condition of perfect safety, but to maintain it in a condition of reasonable safety. The duty of a railroad company is to maintain its road in a condition of reasonable safety, and it is not its duty to maintain its road in a condition of perfect safety.



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continuing, one, and each overflow resulting from a neglect of that duty are also a new cause of action for any injury thereby occasioned to the crops and land. A party injured by an imperfect structure or a ~~xxx~~ wrongful or negligent act is not bound to assume that the structure will be permanent or that the wrongful or negligent act will be continued, but he has a right to regard it as of a transient character. The damage which the plaintiffs suffered by reason of the wrongful acts of the defendant might or might not occur, and they had a right, in taking a lease of the land, to act upon the presumption that the nuisance would not be continued and the defendant would perform its continuing duty imposed by the law to not obstruct the passage of the water in its natural channel."

It follows from what is above said, that appellee was not barred of his rights against appellant for injuries caused by appellant through the imperfect construction of its railroad embankment in failing to provide the necessary outlets for the passage of the water over the land in question, by reason of the fact that he renewed his lease from time to time with knowledge of the existence of such embankment, and that the same might cause the overflow of the land and the destruction of his crops.

Appellant contends that four instructions given by the court in favor of appellee, were erroneous and should have been refused. One of them simply states the provision of the statute requiring railroads to construct necessary culverts and sluices

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above set out and the others state the law applicable to the case as we have above held and as appears to be laid down in the authorities above referred to. There was therefore no error in these instructions and they were properly given. Ten instructions were given for appellant and twelve refused. The ten given instructions seem fully to cover appellant's theory of the case so far as his views were in accord with the law. We have carefully examined the twelve refused instructions and find that the court did not err in refusing the same, for the reason that some of them were covered by those given for appellant and others were not in accord with our views of the law as above set forth. The proofs in this case show right of recovery on the part of appellee, and as there was no reversible error committed by the court upon the trial, the judgment should be and is affirmed.

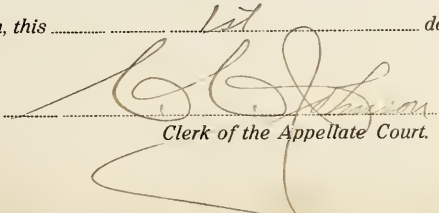
Judgment affirmed.

Not to be reported in full.

• *Flora of India* (1961) 2: 144, f. 10

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# OPINION



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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 121 day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 40

ERROR TO  
APPEAL FROM

vs.

No. 47

March Term, 1915

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. Carl E. Sheldon





March Term, 1910.

Holla . . . Treese,

Appellee,

Reinhardt . . . with order to pay,

Appellant.

Opinion by Wiglee, . . .

Appellee sued appellant for trespass, seeking, by his suit to recover both actual and punitive damages. There was a verdict in ~~favor~~ favor of appellee for \$430. On the argument of a motion for a new trial, the court required a recititur of \$180 and judgment was entered against defendant for \$250, from which judgment this appeal is prosecuted.

Appellant complains there was not sufficient evidence to sustain the verdict, that proper evidence offered by appellant was refused and the court committed prejudicial error in giving, refusing and modifying the instructions. This suit grew out of the following facts; *\* Appellant that* ~~on February 8, 1910, T. B. Bradley~~ *February 8, 1913* owned a grocery store in Ferris, Illinois, the stock being worth ~~about~~ *about* \$1500, and on ~~that date~~ *that date* traded it to Holla . . . Treese, appellee, taking in exchange ~~for~~ *claim,* ~~this amount~~ of cash and a house and two lots. *defendant* At that time Bradley was indebted to ~~appellee~~ *appellee* in the sum of \$475.94 for goods which appellant ~~had~~ sold him.

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1941-1942 - 1943 - 1944

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...there was a variety of ...  
...and ...

For 400. In the treatment of a patient with a new

602 037 In addition to being a friend of the

[illegible]

... ..

1961-1962

...the evidence is consistent with the hypothesis that the ...

ORDERED BY THE COURT THAT THE DEED BE RECORDED.

1945

Viburnum . . . . .

1913

18

*[Faint handwritten notes at the bottom of the page]*

1. The first part of the document is a list of names and dates, which appears to be a record of some kind. The names are written in a cursive script, and the dates are in a more formal, printed style. The list is organized into two columns, with names on the left and dates on the right. The names are: John Smith, James Brown, William Jones, and Thomas White. The dates are: 1810, 1811, 1812, and 1813. The list is followed by a signature, which appears to be "John Smith".

1. What is the purpose of the study?

The trade was made on Saturday and appellant being

~~learned~~ ~~of the transfer of one of its accounts.~~

~~On Monday~~ ~~sent~~ ~~Belge~~ its credit man and treasurer from Marion, where it carried on a wholesale grocery store, to Herrin to try to collect the account.

When Belge arrived at Herrin he found ~~appellee~~ in possession of the stock ~~that had~~ ~~Bradley~~ ~~store.~~

After talking over ~~the trade~~ with ~~appellee~~ who had been a customer of ~~appellee~~ for a number of years, he re-

turned to Marion. The next day he returned to Herrin in company ~~with~~ Walter L. Scaggs, a young attorney ~~who~~

~~was not appellee's general attorney but was occasion-~~ ~~ally employed by it to collect accounts.~~ ~~but was not its general attorney~~

~~called on appellee at the store and as to what oc-~~

~~curred there between them and appellee, the accounts~~ ~~do not agree.~~ ~~as to what happened.~~

~~Belge~~ states that Belge said to him "I brought Mr. Scaggs along with me ~~and~~ you can fix this matter up" and further said, "you can insure these accounts or agree to pay them, or see that they are paid and we won't attach them; if you do not, we will attach the goods and we will make what we can out of the goods"; that in the course of the conversation Scaggs said, "Hello, you got yourself in bad; you have yourself in ~~the~~ where you can't pay out.

If you keep out of the penitentiary you will do well".

~~Belge and Scaggs~~ ~~deny~~ ~~that~~ ~~these statements were made and testified that~~

they went there to find out about the trade ~~between~~ ~~appellee and Bradley~~ and see if there was any way the

account could be ~~collected~~ ~~made.~~ but Scaggs himself admitted that he said ~~to appellee~~ "surely this is not a fraudulent transaction; if it is, these goods are liable to

the 21st day of January on Thursday and yesterday week  
the 22nd day of January on Friday and yesterday week  
the 23rd day of January on Saturday and yesterday week  
the 24th day of January on Sunday and yesterday week  
the 25th day of January on Monday and yesterday week  
the 26th day of January on Tuesday and yesterday week  
the 27th day of January on Wednesday and yesterday week  
the 28th day of January on Thursday and yesterday week  
the 29th day of January on Friday and yesterday week  
the 30th day of January on Saturday and yesterday week  
the 31st day of January on Sunday and yesterday week  
the 1st day of February on Monday and yesterday week  
the 2nd day of February on Tuesday and yesterday week  
the 3rd day of February on Wednesday and yesterday week  
the 4th day of February on Thursday and yesterday week  
the 5th day of February on Friday and yesterday week  
the 6th day of February on Saturday and yesterday week  
the 7th day of February on Sunday and yesterday week  
the 8th day of February on Monday and yesterday week  
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the 17th day of February on Wednesday and yesterday week  
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the 19th day of February on Friday and yesterday week  
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the 27th day of February on Saturday and yesterday week  
the 28th day of February on Sunday and yesterday week  
the 29th day of February on Monday and yesterday week  
the 30th day of February on Tuesday and yesterday week  
the 31st day of February on Wednesday and yesterday week

It is the duty of the Government to protect the rights of its citizens and to maintain the peace and order of the country.



attachment. Felge and Scaggs understood that <sup>what</sup> Bradley  
had received ~~the money and the levy~~ <sup>plaintiffs</sup> ~~and~~  
~~description of the property~~ <sup>a description of the house and lots</sup> ~~and~~  
~~that evening~~ <sup>that</sup> ~~the~~ <sup>plaintiffs</sup> ~~certified house~~ <sup>Bradley</sup> ~~old~~  
~~lands in terran.~~ <sup>by also learned</sup> They afterwards called on

Morgan, an attorney, ~~who held an original writ of replevin~~  
~~which had been previously issued in the matter.~~ <sup>and</sup> They and  
then returned to ~~terran~~ <sup>the</sup> and a writ of attachment was  
sworn out against Bradley <sup>by</sup> Felge, the process being  
prepared by Scaggs. The writ was delivered that  
night to the office deputy sheriff by Scaggs, who  
instructed him to levy it on the household goods of  
J. M. Bradley. The office deputy delivered it to

the <sup>the</sup> ~~deputy sheriff~~ <sup>the</sup> ~~office.~~ <sup>Next</sup>  
morning the sheriff went to ~~terran~~ <sup>plaintiffs</sup> and a deputy with  
Cassway, went to ~~terran~~ <sup>plaintiffs</sup> at about eight o'clock,  
levied on his stock, ~~seized and~~ <sup>from plaintiffs</sup> ~~outside~~ the keys  
of the store ~~and~~ <sup>and</sup> looked it up after affixing  
a notice of the levy on the door. The sheriff then  
returned to terran and at ~~about two hours~~ later saw  
Scaggs and after talking to him telephoned Cassway  
to take down the notice, release the stock and give  
~~appliance~~ <sup>up the</sup> ~~the~~ <sup>accordingly</sup> ~~directions~~ <sup>plaintiffs</sup> ~~to take down the notice~~  
~~and attempt~~ <sup>plaintiffs</sup> ~~to deliver the keys~~ but found ~~the~~ <sup>plaintiffs</sup> ~~left the~~  
city and he was ~~therefore~~ <sup>plaintiffs</sup> ~~unable to deliver them~~  
until nearly noon the next day, when ~~he~~ <sup>plaintiffs</sup> ~~returned.~~

<sup>Plaintiffs</sup> testified that during the time the store  
was closed ~~by the attachment~~, certain fruits and veg-  
etables therein froze and the rats destroyed some meal



by making through the sheriff's office at that  
his damages amounted to \$100.00. The sheriff  
sheriff ~~testified~~ testified that Scaggs called him up  
over the phone the evening before the levy was made  
and told him to levy on the stock at night; that the  
next morning Scaggs called him again and ~~informed~~  
~~that~~ the stock of goods had been levied upon, stated  
that is what he wanted done. Morgan's explanation  
however, he stated that some ~~body~~ <sup>body</sup> called him in  
the evening over the telephone, and he understood  
it was Mr. Scaggs and he assured the second conver-  
sation ~~with~~ <sup>was also</sup> with him, ~~also~~. Scaggs testified he did  
not talk to the deputy sheriff before ~~the stock was~~  
~~levied on~~ <sup>either</sup> nor after the levy, until the afternoon of ~~the~~  
the day <sup>when</sup> the levy was made and he did not tell him before  
or after the levy that he wanted the stock levied on;  
that when he learned from the sheriff that the levy had  
been made he ordered the goods released.

~~Scaggs~~ <sup>defendant</sup> attempted to prove by Scaggs, Scaggs  
and Morgan that when they were in consultation in  
Morgan's office, Scaggs told Scaggs to have the writ  
of attachment levied on Bradley's household goods  
and not to levy on the stock, but the court refused  
to ~~admit~~ <sup>admit</sup> this testimony, ~~and to the jury.~~ <sup>excluded</sup>  
The defendant also offered to prove by several witnesses that  
~~its treasurer~~ Scaggs had given Scaggs positive in-  
structions immediately before the issuance of the  
attachment writ, to have the same levied on the  
household goods of Bradley and the court ~~refused~~  
~~to admit~~ <sup>excluded</sup> this testimony. ~~and to the jury.~~ <sup>excluded</sup>  
~~that the rulings of the court in refusing to admit~~





~~in evidence, the instructions given to George, con-~~  
~~stituted prejudicial error. The amount of the judg-~~  
~~ment, \$200, was far in excess of the actual damages~~  
~~sustained by <sup>plaintiff</sup> and the verdict of the jury~~  
~~must have been therefore, largely composed of punitive~~  
~~or vindictive damages. In this connection, it is the~~  
claim of appellant that George was but a special agent  
employed for a particular purpose, with positive in-  
structions to have the attachment writ levied on the  
household goods of Bradley, and that if he ordered  
the levy to be made upon the stock of goods of app-  
ellee, he exceeded his authority and appellant is not  
liable for any damages occasioned thereby, but that  
if there is any liability it is that of George him-  
self and not of appellee. We consider it true, as  
a general rule, that if an agent commits a tort, and  
in doing so exceeds the limit of his authority, the  
principal is not liable therefor, even though the act  
was committed by the agent for the benefit of the  
principal as he thought. In Cleveland Iron Works Co.  
v. Egan, 37 Ill. App. 196, it was held that an agent,  
who had authority to bring suit on behalf of the Com-  
pany was not authorized to charge his corporation with  
his own malicious acts in setting in motion the  
criminal procedure of the state from the inevitable  
result ~~which~~ of which the corporation could derive no benefit.  
In Whittington v. Mass & Ill. App. 34 the court  
said, "The rights, duties, and liabilities of attorneys  
at law, (not officers, nor clerks  
that have frequently been before the supreme court  
of this state.

~~the first of the series, and~~  
~~the second of the series, and~~  
~~the third of the series, and~~  
~~the fourth of the series, and~~

~~the fifth of the series, and~~  
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~~the twenty-fourth of the series, and~~

~~the twenty-fifth of the series, and~~  
~~the twenty-sixth of the series, and~~  
~~the twenty-seventh of the series, and~~  
~~the twenty-eighth of the series, and~~

~~the twenty-ninth of the series, and~~  
~~the thirtieth of the series, and~~  
~~the thirty-first of the series, and~~  
~~the thirty-second of the series, and~~

where an attorney is employed to sue for and collect a debt without express or specified authority, he can lawfully do no more than obtain a judgment, order an execution and receive and receipt for the money. He cannot take less than the amount due in satisfaction of the debt or receive anything but money. He has no implied authority. If he were employed generally by appellant to collect this debt appellant would be bound to answer for his acts, but if he was instructed specifically what to do and the action which he took, was contrary to his instructions and not impliedly necessary for the collection of the debt, appellant could not properly be held liable for any wrongful act he may have committed. If he exceeded the authority given him and committed such an act and injury resulted therefrom to appellee, he acts and not appellant would be liable therefor. *Trembull v. Nicholson*, 27 Ill., 148.

The thing it was proper in this case to show the extent of Leagues employment and the authority conferred upon him by appellant and for that purpose the evidence above referred to, was competent and should have been admitted. But apart from the right of appellant to show the scope of the employment of Leagues as a defense to the suit, there is another reason why this proof was admissible. As heretofore stated this suit was brought for punitive as well as actual damages and the judgment included both. The evidence in question was clearly admissible as bearing upon the question of the amount of punitive damages and should have been heard for this purpose, even if it had not been admissible generally in defense of the suit. For the error of the court in refusing to admit the testimony upon the question of the instruct-



ings given to the cities. Thus, the judgment of  
the court below will be reversed and the cause re-  
manded.

Reversed and remanded.

Not to be reported in full.



BY ORDER OF THE BOARD OF DIRECTORS OF THE  
-35- BOARD OF THE UNITED STATES OF AMERICA

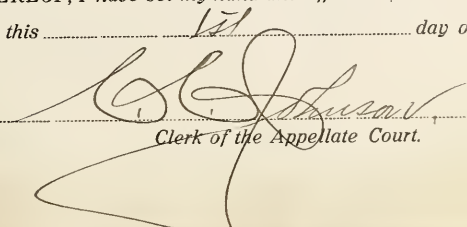
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Approved by the Board

1934

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# PINION

WILMID

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197A55

1222

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....

.....

T. P. Morey,.....

Appellee.

.....

.....

.....

.....

vs.

No. 54.....

March Term, 1915

.....

.....

Ed. Simpson,.....

Appellant.

.....

.....

197 I.A. 55

ERROR TO  
APPEAL FROM

Circuit COURT

Bond COUNTY

TRIAL JUDGE

HON. Geo. A. Crow.



March Term, 1913.

T. F. Morey,

Appellee

Vs.

Ed Simpson,

Appellant.

Appeal from Bond.

Opinion by Higbee, P. J.

*\* It appears that defendant*  
 On December 7, 1912, appellant, at ~~St. Charles,~~  
~~burg,~~ Illinois, executed and delivered a note  
 payable to the order of the Paxton-Backman Chemical  
 Company, for the sum of \$2200. due ten months after  
~~said~~ date, with interest at the rate of seven ~~per~~  
~~cent per annum~~ after maturity. There ~~was~~ *was* power  
 of attorney <sup>1913</sup> attached to said note, authorizing any  
 attorney of any court of record to appear in such  
 court in term time or vacation, at any time there-  
 after and confess judgment without process, in favor  
 of the holder of the note for such amount as might  
 then appear to be unpaid, together with ~~said~~ costs  
 and \$100 attorney's fees. *The* note was after-  
 wards and before maturity *indorsed* in blank with-  
 out recourse by the payee, and on August 25, 1913,  
 a judgment was entered in vacation by confession  
 in the circuit court of Bond County in favor of  
~~appellee, T. F. Morey,~~ *defendant* against ~~appellant,~~ *plaintiff* for the  
 sum of \$2300 and costs. At the September Term,  
 1913, ~~of said court,~~ *of said court* on motion of ~~appellant~~ *defendant* exe-



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• not on it to

1. n. [1904]

Optimism by Nature

On December 7, 1961, [redacted] was present at the meeting.

... between the two, and

payable to the order of the station - please

[illegible]

with date, with interest of the rate

cent: or annum after maturity.

C-57

of attorney attached to said state, authorized in

attorney of any court of record or any court of such

CONFIDENTIAL

After the 1990s, the number of people who have been arrested for drug offenses has increased significantly. This is due to a number of factors, including the increased use of law enforcement, the increased use of surveillance technology, and the increased use of community policing. The increased use of law enforcement has led to a significant increase in the number of people who have been arrested for drug offenses. The increased use of surveillance technology has also led to a significant increase in the number of people who have been arrested for drug offenses. The increased use of community policing has also led to a significant increase in the number of people who have been arrested for drug offenses.

of the holder of the note for such amount as the

then appear to be identical, but are of two different

and 100 attorney's fees.

words and before starting; informed a black 11-

out recourse by the court, and on March 15, 1918.

judgment was entered in favor of defendant.

in the circuit court of

ad + 70      \* 78      + 196      18      8      vaxco      -      A      2011-12

$\frac{d}{dt} \left( \frac{1}{r^2} \right) = -\frac{2}{r^3} \frac{dr}{dt}$

cution on said judgment was stayed and ~~appellant~~ <sup>defendant</sup> granted leave to plead ~~a number of pleas and amended pleas were filed and demurrers sustained thereto, but~~ the case finally went to trial on

what was known as the second amended plea, which set up as ~~matters of defense~~ <sup>defense</sup>, that ~~appellant~~ <sup>defendant</sup> bought of ~~said company~~ <sup>payee</sup> 40,000 pounds of stock powder, under a contract in writing, <sup>the plea</sup> setting out in full the agreement of the parties; that the price to be paid <sup>contract</sup> for said stock powder, was \$2200 and defendant, as

part payment therefor, sold and delivered one horse of the value of \$600 and the note sued on in this case; that after execution of the order for the purchase of the stock powder and in consideration of said promissory note, <sup>payee</sup> said Chemical Company prom-

ised to furnish defendant a salesman to assist in selling said stock powder, ~~appellant then had in~~ <sup>to</sup> in his possession and that the foregoing was the sole consideration of said note; that afterwards ~~appell-~~ <sup>the</sup> ant requested the company to furnish him a sales-

man to assist him in selling the stock powder he then had in his possession in accordance with the terms of said agreement, but that the company ~~wholly~~ <sup>which</sup> failed and refused to provide such assistant; that

<sup>there</sup> upon such failure ~~appellant~~ <sup>do,</sup> prior to the assign-  
ment and transfer of said promissory note, by the ~~payee~~ <sup>defendant</sup>, revoked and rescinded ~~his said~~ <sup>the</sup> order for

~~said~~ <sup>the</sup> stock powder and notified the ~~Luxton-Lekman~~ <sup>the</sup> Chemical Company of said revocation and cancella-  
tion; that said company consented to such cancella-  
tion and revocation and did not at any time deli-  
ver ~~to appellant~~ <sup>the</sup> any part of said 40,000 lb of stock

[illegible]

~~powder, whereby the consideration for said prom-~~  
~~issory note wholly failed prior to the assignment~~  
~~and transfer of the same; that at the time of and~~  
~~prior to the assignment of said promissory note to~~  
~~H. H. Morey and by H. H. Morey to [illegible], they~~  
~~then had notice of the defense to said promissory~~  
~~note and therefore that T.H. Morey was not and is~~  
~~not an innocent holder of said promissory note with-~~  
~~out notice.~~

~~Appellee in reply denied that he had notice~~  
~~of any alleged defense to said note at the time he~~  
~~bought the same and averred that he purchased the~~  
~~note from H. H. Morey before maturity; that H.~~

~~H. Morey at the time he purchased the note, did not~~  
~~have notice of any defense; that at the time [illegible]~~  
~~he took said note, the consideration had not wholly~~  
~~failed; that said order in said plea mentioned was~~  
~~not revoked and rescinded as alleged, in the plea.~~

~~At the conclusion of all the evidence in the case,~~  
~~on motion of appellee the court directed a verdict~~  
~~in his favor and on such verdict being returned,~~  
~~by the jury, the court overruled a motion for a new~~  
~~trial and entered an order that the judgment by~~  
~~confession stand. From that judgment order, defend-~~  
~~ant below has appealed to this court.~~

~~On the trial below appellant sought to show~~  
~~by the evidence, that the company, having failed~~  
~~to comply with its contract, to furnish a man to~~  
~~assist in selling the powder appellant had on hand,~~  
~~consented to the cancellation of such contract;~~  
~~that by reason of such cancellation nothing was due~~  
~~on said note, and appellant was entitled to the poss-~~



on with the... and said that... was called to the stand... that by reason of such conduct... was called to the stand... commented to the counsel that it was... exist in well as the number... to comply with the contract to... of the evidence, that the company... called to the stand... the trial below... the trial below... and below was... the court... in his favor and on... the court... by the jury, the court... the court... trial and entered an order that the... confession stand... trial and entered an order that the... on motion of appellee the court... the conclusion of all the evidence in the case, not revealed and... the court... called; that said... the court... took said note, the consideration... have notice of any defense; that at the time... I. Forey at the time... the court... note from I. Forey before... the court... out notice.

ession <sup>of it</sup> of the same; that H. H. Morey had notice of this defense when he purchased the note; that ~~appellee~~ <sup>plaintiff</sup> was the father of H. H. Morey and the transfer of the note to him was in the nature of a fraud or subterfuge. <sup>at</sup> The court held ~~on~~ <sup>at</sup> the trial that the burden was upon ~~appellant~~ <sup>defendant</sup> to establish that notice of some defense ~~to the note~~ was brought home to ~~appellee~~ <sup>plaintiff</sup> before he purchased the note, and if this be correct it is needless to discuss the question whether H. H. Morey knew of such defense or not, or whether appellant had any other defense to the note. <sup>at</sup> It was admitted that the note was indorsed in blank by the company and <sup>at</sup> on the trial H. H. Morey testified that he gave his check to the company for the note, and afterwards sold it to ~~his~~ <sup>plaintiff</sup> ~~father~~ <sup>father</sup>, the appellee, on February 27, 1913; that he, at that time, called his father up over the telephone and made the sale in that way. It appeared that the note was in possession of H. H. Morey at the time he made an affidavit as to ~~appellant's~~ <sup>defendant's</sup> signature, when the confession of judgment was taken, but he ~~states~~ <sup>testified</sup> that the note had been sent back to him, then. <sup>to</sup>

The tendency of the courts of this state is to sustain the negotiability of commercial paper not yet due and the case must be a strong one where they will annul the title of the transferee, every presumption being in favor of its validity. "The rule now is that the endorsee or assignee of commercial paper who takes the same before maturity for a valuable consideration, without knowledge of any defects and in good faith, will be protected against



...; that is, they had notice  
of the defect and he purchased the note; that  
... the defect in the note was known to the  
transferor of the note before he transferred it  
to the transferee. The court held that the  
fact that the transfer was made in good faith  
and for value was not sufficient to protect the  
transferee from the defect in the note. The court  
held that the transferee must also have had  
notice of the defect before he purchased the note.  
This is correct. It is necessary to determine the  
question whether J. F. Forey knew of such defect or  
not, or whether he ought to have known of it.  
The note itself was admitted that the note was  
issued in blank by the company and was the  
property of the company. It is clear that the  
company intended that the note should be  
payable to the note, and it is clear that  
the company intended that the note should be  
payable to the note, and it is clear that  
at that time, called his father-in-law and  
made the note in that way. The note was  
in possession of J. F. Forey at the time  
he made an affidavit as to the facts of the  
case. When the consideration of the note was  
made, it was clear that the note had been  
issued in blank. The tendency of the courts in this  
country is to sustain the responsibility of the  
transferor of the note, and the case will be  
decided there. They will annul the title of the  
transferor, but the presumption will be in  
favor of the validity of the note. The  
rule now is that the evidence on the part of the  
defendant who takes the note before the court  
is a valuable consideration, without knowledge of any  
defects and in good faith, will be protected against

the defenses of the maker, and mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title. In other words the only thing which will defeat his title is bad faith on his part, and the burden of proof is upon the person assailing his right to establish that fact by a preponderance of the evidence. (Watson v. Alley 141 Ill. 284; Lewis vs. Horner 165 id. 347; Merritt v. Boyden, 191 id. 136; Murray vs. Beckwith 81 id. 43; Shreeves vs. Allen, 79 id. 553) However harsh this rule may on first impression seem to be, it is based upon the policy of the law which gives full faith and credit to commercial paper transferred before maturity, so that it may circulate, as far as possible, with all the conveniences of currency". Bradwell vs. Pryor, 221 Ill. 602.

It is contended by appellant that as there was proof tending to show that H. B. Corey had notice of some defense to the note brought to his knowledge and that afterwards he sold the note to appellee, who is his father, that from these and the other attendant circumstances referred to, the jury would have a right to infer that appellee knew of such defense and that the transfer from H. B. Corey to appellee, was in the nature of a fraud; but the mere relationship between these parties, does not even tend to show fraud in the transaction, as H. B.



Morey had the same right to sell the note to his father that he had to sell it to any one else and fraud must be proved and not presumed. There was no such proof of fraud in the transaction or of notice to appellee, either direct or circumstantial, as was sufficient to overcome the prima facie case made out by the production of the note indorsed as above set forth and sold to appellee before maturity and it was therefore proper for the court to direct a verdict in favor of appellee.

The judgment order of the circuit ~~and~~ court will be affirmed.

Affirmed.

Not to be reported in full.

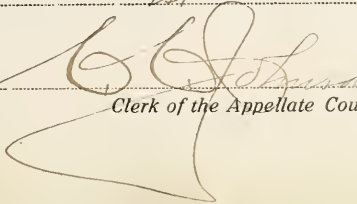
fore and the same time to send the same to the  
father that he had to send it to him and also  
found that he never was not a son. It was not  
such proof of him to the father as to the father  
to appeal, either direct or indirect, he was  
sufficient to remove the same from the  
out of the production of the note indicated by the  
set forth and sold to appeal before the father and  
it was therefore proper for the court to direct a  
verdict in favor of the father.  
The judgment of the court is affirmed.  
Court will be affirmed.

affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.



# PINION



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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 12th day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 83

ERROR TO  
APPEAL FROM

vs.

No. 73

March Term, 1915

Bureau COURT

Madison COUNTY

TRIAL JUDGE

HON.

Louis Bernier



Lard Term, 1913.

Mary L. Bell, Administratrix, etc.,)

Appellee

vs.

Appeal from

East St. Louis and Suburban

M-A-I-L-S-O-N.

Railway Company,

Appellant.

Opinion by Hibbs, J. C.

\* On January 19, 1913, at about three o'clock in the afternoon John Bell, while delivering goods with a wagon drawn by a mule team, in Collinsville, Illinois, was run into by one of <sup>appellant's</sup> ~~appellant's~~ cars and so injured, that he died <sup>about</sup> ~~some~~ six days thereafter. <sup>widow</sup> ~~Mary L. Bell, his~~ widow, was appointed administratrix, brought suit against <sup>appellant</sup> ~~appellant~~ for the benefit of the next of kin, and obtained a judgment in her favor, for the sum of \$250. In appeal to this court, that judgment was reversed and the cause remanded. (188 Ill. App. 250) In the second trial, <sup>plaintiff</sup> ~~plaintiff~~ again recovered a judgment in her favor, the same being this time for the sum of \$2250. ~~and~~ and from that judgment the defendant ~~has~~ has again appealed, contending that the judgment was contrary to the weight of the evidence and that the court erred in the admission

Jan 10, 1910

Mr. J. H. Bell, Administrator, etc.,

Appellee

Agent from

100

100-100-100-100

Post St. Louis and

Way Company,

St. Louis.

Opinion by Justice, etc.

On January 10, 1910, at St. Louis

of which in the afternoon of the 10th

invested funds with a view to the

of the investment, the funds were

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of certain evidence offered by appellee.

~~He appeared~~  
~~It is shown that Bell~~, at the time  
of the injury, <sup>Bell</sup> was on his way to deliver ~~some~~  
goods to a Mrs. Johnson, who lived on the south  
side of Main Street in Collinsville, in the  
second house west of Oversey street and that  
~~appellee~~ <sup>appellee</sup> has a single track for its electric  
cars along the center of Main Street, which  
runs east and west. Bell was going west along  
Main Street and one of ~~appellee's~~ <sup>appellee's</sup> cars was  
behind him going in the same direction. After  
~~he had passed~~ <sup>possibly</sup> Oversey street, which crossed  
Main Street at right angles and ~~was~~ <sup>was</sup> Mrs.  
Johnson's, the wagon in which he was riding, <sup>being</sup>  
then upon the railroad track, was struck by  
~~appellee's~~ <sup>appellee's</sup> car and Bell was thrown out and  
received the injuries which ~~subsequently~~ res-

ulted in his death. ~~It is the theory of appellee~~

~~Plaintiff~~ <sup>Plaintiff</sup> claimed ~~in the record of due care and to be~~  
that the deceased was, at the time, driving west

with one wheel of the wagon between the rails and  
the other on the north side of the track; that

the car was being run at an excessive rate of  
speed; that those in charge ~~thereof~~ <sup>the car</sup> gave no

signals; that there was nothing to obstruct

the view of those in charge of the car when it  
arrived within 200 feet of the team and wagon

~~and~~ <sup>and</sup> that they failed to have the car under con-  
trol, permitting ~~it~~ <sup>it</sup> to strike the ~~team and wagon~~ <sup>team and wagon</sup>

causing the  
fatal injury to ~~appellee's~~ <sup>plaintiff's</sup> intestate; ~~that at~~

~~the time Bell was in the exercise of due care.~~



[illegible]

~~and caution for his own safety.~~

~~On the part of appellant, it is contended~~ *Exposition*  
that the car was being run at a moderate speed, that proper signals were given and that Bell was guilty of ~~negligence~~, in that while driving clear of the track outside of the rails on the north side, he suddenly turned his team straight across the track in front of ~~appellant's~~ *appellant's* car, so that the car could not be stopped in time to avoid the collision. \*

In order to entitle appellee to recover, it was necessary for her to prove by a preponderance of the evidence that her decedent was himself at the time of the injury, and just prior thereto, in the exercise of ordinary care for his own safety. ~~On this point three witnesses testified for appellee.~~ *+ 7 n plaintiffs* *testimony*  
Martin Bardsley stated, that he was on Main Street a short distance west of Guernsey street about twenty feet from the street car track, ~~that he~~ *and* first saw Bell approaching from the east 300 feet away; that as Bell came on, ~~witness~~ *he* observed that the wheel of his wagon was caught on the inside of the tracks "slidding along" and the wheels seemed to be trying to roll the wagon over to the north; that ~~witness~~ *he* turned away when the wagon was 70 or 80 feet from him, continuing in the same way as before; that ~~the next thing that attracted his attention was a crash and when he looked, Bell and the wheels were~~ *looked round on hearing a crash*

and caution for the safety of the car.  
On the part of the defendant, it is shown  
that the car was being run at a moderate  
speed, that proper signals were given and that  
the driver was fully on his guard, and that while  
driving clear of the track outside of the rails  
on the north side, he suddenly turned the car  
straight across the track in front of the  
car, so that the car could not stop in  
time to avoid the collision.  
In order to establish negligence on the part  
of the defendant, it is necessary to show that  
the evidence that the defendant was negligent at  
the time of the injury, and that he was  
in the exercise of ordinary care and  
caution. In this regard, the evidence is  
that the defendant was negligent, and that  
he was on his guard and that he was  
exercising extreme care and caution at the  
street car track, that the car was  
in front of the car at 100 feet away; that he  
on, witness observed that the wheel of the wagon  
was caught on the inside of the track, and that  
along, and the wheel seemed to be in the track  
the wagon over to the north; that the wagon  
away with the wagon was Y. and the wagon was  
continued in the same direction, and that the  
next time it was seen, it was in the same  
direction and was looking, and that the wagon was

down on the street or in front of the car; that the car was stopped after the collision about 60 feet west of Guernsey street. Charles Carter swore that he was talking to Lardley on Main Street, about 40 feet from the center of Guernsey and saw Bell 15 or 20 feet away; that <sup>he</sup> ~~he~~ was driving in the center of the street with one wheel in the center of the track and one on the north side <sup>it</sup> ~~thereof~~; that ~~a car~~ <sup>after</sup> ~~was~~ <sup>after</sup> ~~walking~~ <sup>after</sup> ~~west~~ <sup>after</sup> about 40 feet and passing <sup>after</sup> ~~all~~, he heard the crash; ~~that~~ <sup>but</sup> he did not see deceased after ~~he~~ <sup>after</sup> ~~passed~~ <sup>after</sup> ~~him~~ until ~~reached~~ <sup>after</sup> ~~the~~ <sup>after</sup> ~~collision~~. Guy L. Co-Griffin <sup>after</sup> ~~he~~ was driving west in an automobile, and testified he passed deceased about 100 feet from the place where the accident occurred, and the latter was then driving with one wheel between the tracks, but that he did not know where Bell drove after witnesses passed him. On the part of ~~Amell~~ <sup>Amell</sup>, Jesse Drake testified that Bell drove with one wheel between the tracks until he reached the center of Guernsey street when he swung to the left a little bit and drove parallel with and outside the tracks to a point about 40 feet beyond the intersection of Guernsey street, and then turned south across the tracks, where he was struck. Five other witnesses also testified they saw deceased just before the accident; that he was between the curb and the rail on the north side and that just before

[illegible]



the collision, he turned south across the track. These witnesses for ~~appellant~~ <sup>appellee</sup>, were corroborated by undisputed testimony, showing that the mules and the left front wheel of the wagon were struck by the car; that deceased, after the accident, told his employer that he had an order to deliver at Mrs. Johnson's; that he went down Main Street and attempted to cross over to her place to make the delivery and the further fact that he did actually make the delivery of the goods after he was injured and before he was taken away for medical treatment. ~~the~~ +

It appears to us that it was clearly shown by the preponderance of the evidence, that after he passed Guernsey Street Bell was driving on the north side of the tracks, and that he turned south to cross the tracks for the purpose of delivering the goods intended for Mrs. Johnson. Concerning the question of the speed at which the car was traveling, a number of witnesses testified, placing it at different rates from ten to twenty two miles an hour. As to whether signals were given by those in charge of appellant's car, several witnesses for appellee testified that they heard none, while six testifying for appellant stated positively to having heard signals repeatedly given, three of whom testified their attention was so attracted thereby as to induce them to watch the car. In Chicago City Ry. Co. v. Alher 107 Ill., App. 397, in a case



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at the condition, in fact, was that the  
and attempted to cross over to the other side  
the delivery and the condition, in fact, was that the  
actually have the condition, in fact, was that the  
was injured and the condition, in fact, was that the  
local treatment.

It appears to be that it was clearly  
shown by the condition, in fact, was that the  
after he crossed the condition, in fact, was that the  
on the north side of the condition, in fact, was that the  
turned south to cross the condition, in fact, was that the  
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to deliver the condition, in fact, was that the  
one was traveling, the condition, in fact, was that the  
killed, showing it a different condition, in fact, was that the  
twenty feet or more, the condition, in fact, was that the  
was given by the condition, in fact, was that the  
and, several witnesses for the condition, in fact, was that the  
that they were not, the condition, in fact, was that the  
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have been established the condition, in fact, was that the  
their attention was directed to the condition, in fact, was that the  
and on the condition, in fact, was that the  
of the condition, in fact, was that the

somewhat similar to this, it is said, "As to whether appellant's motor car rang a bell as he approached there is direct conflict of testimony. Several of appellee's witnesses state that they did not hear any bell, and others state positively that there was none. In such a conflict of statement the court and jury who hear and see the witnesses are in a better position to pass upon the value of the testimony on either side than a court of review. It is doubtless true however, that the negative evidence of one who did hear is generally of more evidential value than a mere negative statement of one who did not hear. It is common experience with those in the habit of hearing street car bells or other similar noises that the mind often takes no distinct impression of them, unless rung with unusual clearness, and the presence of an impending peril to any one may perhaps easily distract attention from sounds which would otherwise be remembered."

Following the rule laid down in the case referred to, we conclude that the weight of the most reliable evidence, is to the effect that the danger signals were in fact given by those in charge of appellant's car prior to the collision. On the former trial the judgment was reversed and the cause remanded by reason of a lack of sufficient proof to show either negligence on the part of appellant or due care on the part of the deceased, and the evidence was

[illegible]

substantially the same on the second trial. Appellee contends that a new element was injected into the case by the testimony of several witnesses, showing the density of population and the large amount of travel at or near the place of the injury, but it failed to show that there was any other vehicle at that place at the time in question; and the proofs appear to sustain appellant's claim that its servants were sounding the danger signals as it approached Bell's wagon. It is true that those in charge of the car had an unobstructed view of the wagon of deceased for 200 feet before the car struck it, but there was nothing to indicate to the motorman that the wagon, which was proceeding along the street in the same direction as the car, would be suddenly turned across the tracks directly in front of the approaching car, and in the absence of anything to warn him, the motorman was not bound to assume that the driver of the vehicle would so turn upon the tracks ahead of him. *Wagon v. A. & C. N. R. Co.*, 123 Ill. App. 34. The fact that the car stopped within eight or ten feet after the collision, would tend strongly to contradict the contention of appellee that, at the time of the collision it was running at an excessively high rate of speed. We are of opinion that on this trial, as on the former one,



appellee so clearly failed to show a right of recovery by the proofs, and the verdict is so manifestly against the weight of the evidence that the judgment must be again reversed and the cause remanded.

Reversed and remanded.

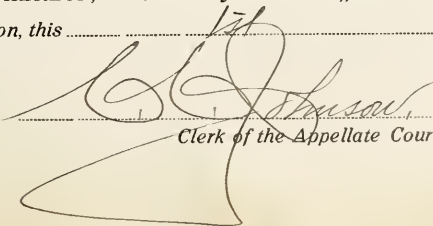
Not to be reported in full



1900-1901

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this ..... day of December,  
A. D. 1915.

  
Clerk of the Appellate Court.

# PINION

FIELD

11 115

2000



197 A 101

1231

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 101

ERROR TO  
APPEAL FROM

Miles F. Biddle et al  
Plffs in Error

vs.

No. 16

March Term, 1915

County COURT

Franklin COUNTY

T. A. Hanson  
Def. in Error

TRIAL JUDGE

HON. Thomas J. Seymour



March Term, 1915.

Miles F. Bixler, doing business  
as Miles F. Bixler Company,

PLAINTIFF in Error,

Vs.

T. A. Henson,

DEFENDANT in Error.

Error to the

County Court of

Franklin County.

Opinion by Mr. Justice Duggs.

This was a suit brought by plaintiff in error, a wholesale jewelry dealer at Cleveland, Ohio, against defendant in error, a retail merchant at West Frankfort, Illinois, on a written order for the sale of certain jewelry and one show case, the contract price therefor being \$198.00. On the trial a verdict was rendered in favor of the defendant, followed by judgment in bar of action and for costs, from which judgment this writ of error is prosecuted.

The show case was to be delivered by freight and the jewelry by express. The order for these goods was taken on December 10, 1913. The show case was delivered to the Railroad Company by plaintiff in error for shipment to defendant in error on December 12, 1913. The jewelry was delivered to the Express Company by plaintiff in error



March Term, 1902.

Miles J. Dixler, doing business  
as Miles J. Dixler Company,

PLAINTIFF IN ERROR,

vs.

T. A. Benson,

DEFENDANT IN ERROR.

Opinion by Mr. Justice

There was a suit brought by plaintiff  
in error, a wholesale jewelry dealer at Cleveland,  
Ohio, against defendant in error, a retail merchant  
at West Frankfort, Illinois, on a written order  
for the sale of certain jewelry and other goods,  
the contract price thereof being \$1500. In the  
trial a verdict was rendered in favor of the de-  
fendant, followed by judgment on writ of certiorari and for  
costs, from which judgment this writ of error is  
presented.

The show case was to be delivered at  
freight and the jewelry by express. The order for  
these goods was taken on December 1, 1901. The  
show case was delivered to the plaintiff by him by  
plaintiff in error for shipment to defendant in  
error on December 1, 1901. The jewelry was deliv-  
ered to the express company of defendant in error

on December 17, 1913. The defense is that the goods were to be shipped so as to reach defendant in error at East Frankfort by December 13, 1913, as he was purchasing said goods to be used in his holiday trade.

There is nothing in the written order signed by defendant in error in reference to the time when said goods were to be delivered, but it is claimed by defendant in error that the agent of plaintiff in error, who took the order, verbally agreed with him that said goods should be shipped so as to reach defendant in error at East Frankfort by December 13, 1913, and that witnesses to the said agreement were called in by said agent, and that he stated that that would be just as good as putting it in the contract, and if this agreement were proper to be shown we think the evidence sustains defendant in error in this contention.

The only questions that arise on this record are: first, whether or not the terms of the written contract can be varied or added to by oral agreements made by the agent of plaintiff in error; second, whether the obtaining of said written order by said agent upon verbally agreeing with the defendant in error to ship said goods so as to reach defendant in error by December 13th would be held as such fraud as would vitiate the contract.

It was provided in the order signed by defendant in error that "Salesman has no authority to change or add to these terms except by writing on the original order, which is subject to our acceptance,

on December 12, 1913. The defendant is not the  
goods were to be shipped to the defendant  
in error of last receipt by December 12, 1913,  
as he was purchasing said goods to be used in his  
holiday trade.

There is nothing in the written order  
signed by defendant in error in reference to the  
time when said goods were to be delivered, but it is  
claimed by defendant in error that the goods were  
plaintiff in error, who took the order, who  
agreed with him that said goods should be delivered  
so as to reach defendant in error of last receipt  
by December 12, 1913, and that witness to the said  
agreement were called in by said agent, and that he  
stated that that would be just as good as written in  
the contract, and if this agreement were shown  
to be shown we think the evidence sustains the  
defendant in error in this contention.

The only question that arises on this  
record are: first, whether or not the terms of the  
written contract can be varied or added to by oral  
agreements made by the agent of plaintiff in error;  
second, whether the obtaining of said written order  
by said agent upon verbally agreeing with the de-  
fendant in error to said goods as to reach  
defendant in error by December 12th would be valid  
as such found as would violate the contract.  
It was provided in the order stated to  
defendant in error that the same was to be delivered  
to change or add to these terms except in writing on  
the original order, which is subject in our opinion.

not subject to countermand. Delivery to the carrier is delivery to the purchaser who pays the charges. Jewelry shipped by express, show case shipped by freight." It would seem from a reading of this provision of the contract that express notice was given to defendant in error that the agent of plaintiff in error had no authority whatever to vary or change the terms of this order or contract, without making said change on the written contract, and that even if such change was made on the written order it would not be binding upon plaintiff in error until accepted by him. That being true, we are unable to perceive why, under the law as has been uniformly held, defendant in error should not be bound by said written agreement in the contract or order signed by him.

It is further to be observed with reference to this matter that defendant in error read this provision of the contract and requested the agent of plaintiff in error to insert the provisions with reference to the delivery of the goods in the contract. It cannot, therefore, be said that defendant in error was not aware of this provision.

C. J. Acree, the agent of plaintiff in error, who took the order for said goods, had no implied authority to guarantee that the goods ~~delivered~~ ordered would arrive at West Frankfort, Illinois, within a designated time, except he did so by writing said agreement on the original con-

not subject to counterclaim. It was the  
carrier in delivery to the plaintiff who made the  
charges. The only thing by express, the goods  
shipped by freight. It would seem from reading  
of this provision in the contract that express notice  
was given to defendant in error that the goods in  
plaintiff in error had no obligation whatever to vary  
or change the terms of this order on contract,  
without making said change on the written contract,  
and that even if such change was made on the writ-  
ten order it would not be binding upon the plaintiff  
in error until accepted by him. That being true,  
we are unable to perceive why, under the law as  
has been uniformly held, defendant in error should  
not be bound by said written agreement in the con-  
tract or order signed by him.  
It is further to be observed with refer-  
ence to this matter that defendant in error took  
this provision of the contract and requested the  
agent of plaintiff in error to insert the provi-  
sions with reference to the delivery of the goods  
in the contract. It cannot, therefore, be said  
that defendant in error was not aware of this pro-  
vision.  
It is, of course, the agent of plaintiff in  
error, who took the order for said goods, and he  
implied authority to guarantee that the goods  
delivered would conform to the order. It is  
Illinois, within a doubt, that the agent of the  
so by writing said agreement on the order and



tract of purchase. If he did so guarantee the delivery of said goods it would be the personal guarantee of said Acree, and not of plaintiff in error. *Neegaard vs. S. F. Hess & Co.*, 36 App, 544, affirmed in 187 Ill., 283; *Finger v. Fire Clay Co.*, 64 App., 437, affirmed in 105 Ill., 505; *Ladison v. Gabalek*, 86 App., 450.

The other proposition as to whether the act of the agent in making the agreement with reference to delivery of the goods would be such a fraud as would vitiate the terms of the contract or order signed by defendant in error, we think is hardly a debatable question. Defendant in error had express notice, by the terms of the order signed by him, that the agent had no authority whatever to make such a verbal agreement, and for us to hold otherwise would be to set aside the fundamental rule that parties are bound to know the law governing their transactions. It may be observed further with reference to this transaction, that by the written order signed by defendant in error, plaintiff in error does not undertake to ~~deliver~~ deliver the goods to defendant in error at West Frankfort, Illinois, but the order specifies "delivery to the carrier is delivery to the purchaser".

It follows therefore that this judgment must be reversed, and the cause remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

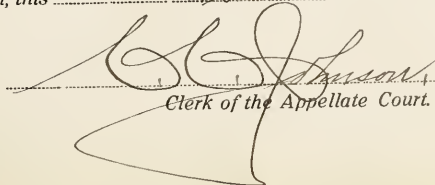
Not to be reported in full.



Not to be reprinted or sold

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 1st day of December,  
A. D. 1915.

  
Clerk of the Appellate Court.



# PINION

FILE

1871



197A 103

1232

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an *OPINION* in the words and figures following:

197 I.A. 103

ERROR TO  
APPEAL FROM

Mary Monroe Adams  
Appellee

vs.

No. 19

March Term, 1915

Philip A. Maus  
Appellant

Bureau COURT

Monroe COUNTY

TRIAL JUDGE

HON. L. Bernreuter



Mary Noonan, Administratrix  
of the Estate of Dennis Noonan,  
deceased,

Appellee.

Vs.

Philip A. Maus,

Appellant.

{  
{  
{ Appeal from the  
{ Circuit Court of  
{ Monroe County,  
{  
I L L I N O I S.

Opinion by Mr. Justice Hoggis.

This is an appeal from a judgment of \$2500.00 entered October 10, 1914, by the Circuit Court of Monroe County, Illinois, on an action on the case brought by appellee against the appellant to recover damages for alleged wrongfully causing the death of appellees' intestate.

The declaration contained four counts. The first count charges that the defendant negligently managed and drove his automobile, upon the public highway, while approaching, meeting and passing the team and wagon of plaintiff's intestate.

The second count charges that he negligently and carelessly managed, drove and operated his automobile upon said highway at a rate of speed greater than was reasonable and proper having regard for the traffic and use of the way.

The third count charges that defendant negligently and carelessly drove said automobile around the curve in said road where the view of the road was obstructed at a rate of speed exceeding six miles per hour.

The fourth count charges that where the



Mary Noonan, Administratrix  
of the Estate of Dennis Noonan,  
deceased,  
Appellee.  
vs.  
Philip A. Mann,  
Appellant.  
Circuit Court of  
Harrison County,  
Illinois.  
1916.

Opinion by Mr. Justice Coffey.

This is an appeal from a judgment of \$2500.00 entered October 10, 1914, by the Circuit Court of Harrison County, Illinois, on an action on the case brought by appellee against the appellant to recover damages for alleged wrongfully causing the death of appellee's intestate.

The declaration contained four counts. The first count charges that the defendant negligently managed and drove his automobile, upon the public highway, while approaching, meeting and passing the team and wagon of plaintiff's intestate.

The second count charges that the defendant negligently and carelessly managed, drove and operated his automobile upon said highway at a rate of speed greater than was reasonable and proper, thereby regard for the traffic and use of the way.

The third count charges that defendant negligently and carelessly drove said automobile around the curve in said road where the view of the road was obstructed at a rate of speed exceeding six miles per hour.

The fourth count charges that when the

said view was obstructed the deceased was suddenly confronted by said automobile; that the team became greatly frightened and unmanageable, which was apparent and known to the defendant, or should have been known to him by the exercise of reasonable care; that defendant failed and refused to stop, but negligently and carelessly drove his automobile up to and past said team at a high and negligent rate of speed, namely, twenty-five miles an hour.

Each of these counts charges negligence in the operation of the automobile owned by the defendant, which negligence, it was alleged, caused the death of the plaintiff's intestate. The general issue was filed, trial was had, resulting in a verdict and judgment for \$2500.00 as above stated.

The evidence tended to show that Dennis Noonan, plaintiff's intestate, a farmer, fifty-two years of age, was also engaged in the huckster business, and on August 19, 1912, was driving a team of mules along the public highway, running north and south from the residence of Mrs. Minnie Nottmier to the residence of Fred Puergelis, where it makes a turn to the southwest. At about six o'clock in the evening on August 19, 1912, appellant was returning from his farm in his automobile, accompanied by his son, George Maus, and while going north on the Kaskaskia road, between Burksville and Renault, at a point about opposite the residence of Fred Puergelis, they met Noonan, travelling in the opposite direction. At this point the road was about fifteen or twenty feet wide, and on the east side there was a bank, the

with that was abridged the necessary responsibility  
conferred by said responsibility, that the law be-  
came essentially frightened and unresponsive, which  
was constant and active in the defendant's mind  
have been known to him by the defendant's possession  
care; that defendant failed and refused to state,  
but negligently and carelessly gave the testimony  
up to and past said time of trial and judgment  
rate of speed, twenty-five miles an hour.  
Each of these counts charges that defendant  
in the operation of the automobile owned by the  
defendant, which vehicle he was driving, caused  
the death of the plaintiff's infant son, the general  
issue was tried, trial was held, resulting in a  
verdict and judgment for \$2500.00 as damages.  
The evidence tended to show that within  
Kearney, plaintiff's infant son, the defendant  
years of age, was then engaged in the business  
business, and on August 15, 1911, the defendant  
team of mules along the route of travel, driving  
north and south from the residence of Mr. J. J. J.  
Hottel to the residence of Mrs. J. J. J., where  
it makes a turn to the southwest of about 11  
o'clock in the evening of August 15, 1911, defendant  
was returning from his home to the residence,  
accompanied by his son, who was then about  
eight months of age, the defendant's son, who was then  
vile and fearful, at which time defendant was  
residing at the residence of Mrs. J. J. J., where  
traveling in the direction of the residence of Mrs.  
point the road was about 100 feet wide, and on the  
side, and on the east side there was a ditch, and

ground on that side being higher than the roadway, while on the west side there was a sloping ridge about six or eight inches high, beyond which was plowed ground,

The evidence of appellee tends to prove that appellant was driving his car at a high rate of speed. Mrs. Nottmier, a witness for appellee, testified that the appellant was driving his automobile at a high rate of speed, estimated by her at thirty miles per hour, and that when he approached Mr. Noonan, the mules which Mr. Noonan were driving spread apart, turned to the right and ran into the plowed field, and then back into the road. Mrs. Nottmier further testified that the mules were running as far as she could see them, Mr. Noonan having hold of the lines. The testimony of her son, Herbert, is practically to the same effect, except he doesn't estimate the speed at which appellant was driving his car.

The testimony of George Maus, son of appellant, is to the effect that at the time his father approached Mr. Noonan, he was only driving about five or six miles per hour; that about thirty feet before they met Mr. Noonan the team turned out of the road on the plowed ground; that they were not running at the time and that the man, (Mr. Noonan) did not seem to hold up his lines and was stooped over; that he did not think Mr. Noonan noticed them at all. He further says that the team walked out of the road by itself, and back into the road a little way beyond them and walked along the road so far as he could notice.

The undisputed evidence is further to the

ground on that side being higher than the roadway,  
while on the west side there was a sloping ridge  
about six or eight inches high, which was  
plowed around,

The evidence of appellee tends to prove  
that appellant was driving his car at a high rate  
of speed. Mrs. Kottner, a witness for appellee,  
testified that the appellant was driving his auto-  
mobile at a high rate of speed, estimated by her at  
thirty miles per hour, and that when he approached  
Mr. Lockman, the wheels which Mr. Lockman were driving  
spread apart, turned to the right and ran into the  
plowed field, and then back into the road. Mrs.  
Kottner further testified that the wheels were run-  
ning as far as she could see them, Mr. Lockman  
having hold of the lines. The testimony of Mr.  
son, Herbert, is practically to the same effect,  
except he doesn't estimate the speed at which  
appellant was driving his car.

The testimony of George Bell, son of  
appellant, is to the effect that at the time his  
father approached Mr. Lockman, he was only driving  
about five or six miles per hour, that he turned out  
just before they met Mr. Lockman the car turned out  
of the road on the plowed ground; that he saw not  
turning at the time and that the car, Mr. Lockman  
did not seem to him to be in a hurry and was stopped  
over; that he did not think Mr. Lockman could see them  
at all. He further says that the team walked out of  
the road by itself, and went into the road a little  
way beyond them and walked along the road on the  
as he could notice.

The undisputed evidence is further to the



effect that about seven o'clock that evening Noonan's team walked into the yard of a Mrs. Mueller, about two miles beyond the point where it had met appellant's automobile, and a little later on Noonan was found lying in the road about one hundred and forty-five yards southeast of Fuergeleis' house, suffering from the injuries from which three days later he died.

The principal ground relied on by appellant for a reversal of this case is, first, that the verdict is against the manifest weight of the evidence, second that the court erred in the giving of instructions on the part of appellee, and in refusing instructions offered by appellant, and third, that the court erred in the admission of testimony offered by appellee over objection of appellant.

First,- there was a sharp conflict in the evidence with reference to whether appellant was driving his automobile at a high and dangerous rate of speed, and as to whether he gave warning of his approach as provided by statute. If the testimony of Mrs. Rottmier and her son, Herbert are to be believed, appellant was driving his car at a high rate of speed, estimated by Mrs. Rottmier at thirty miles per hour, and that no horn was blown or other warning given by appellant. It is true that these witnesses were at a distance of some three or four hundred yards from the place of the accident, and were not in as favorable position to ascertain the matters about which they testified as was George Maus, who testified on behalf of appellant, still the jury saw and heard these wit-



effect that about seven or eight feet even in 'woman's' feet walked into the yard of Mrs. Miller, about two miles beyond the point where it was last seen. The automobile, and a little later on, was found lying in the road about one hundred and fifty-five yards southeast of 'woman's' house, after- ing from the injuries from which three days later he died.

The principal ground relied on by appellant for a reversal of this case is, first, that the verdict is against the weight of the evidence, second that the court erred in the giving of instructions on the part of the jury, and in refusing instructions offered by appellant, and third, that the court erred in the admission of testimony offered by appellee over objection of appellant.

First, - There was a sharp conflict in the

evidence with reference to whether appellant was driving his automobile at a high and dangerous rate of speed, and as to whether he was passing at his approach as provided by statute. At the testimony of Mr. Potter and Mrs. Lee, which are to be believed, appellant was driving his car at a high rate of speed, estimated by Mr. Potter at thirty miles per hour, and that no harm was done or other warning given by appellant. It is true that the witnesses were at a distance of some three or four hundred yards from the place of the accident, and were not in an favorable position to ascertain the matters about which they testified as was George Lee, who testified on behalf of appellant, still the jury was and heard these

nesses testify, and we are not prepared to say that they were not warranted in finding as they did from the evidence in the record.

Second,<sup>Q</sup> It is next contended that the court erred in refusing to give appellant's peremptory instruction offered at the close of appellee's evidence and again at the close of all the evidence, directing a verdict in his favor. This instruction raises the question of due care on the part of appellee's intestate for his own safety at the time of the accident.

It is contended by appellant that there were eye witnesses to the transaction, and, that, therefore, it was error on the part of the court to admit proof of the careful habits of appellee's intestate, and of his skill and experience in the management of horses. The law in this State is pretty well settled that where there are eye witnesses to an accident testimony as to the habits of the person injured are not admissible for the purpose of proving due care on his part. C. & A. R. R. Co., Vs. Pearson, 184 Ill., 386; Casey Vs. Adams, 137 Ill., app., 404; Anderson vs. Met. West Side Bl. Ry., Co., 170 Ill., App. 210.

The question here is, whether as contemplated by these authorities there were, in fact, eye witnesses to the transaction in this case. It is true that Mrs. Lottmier and her son, Herbert, witnesses for appellee, and George Laus, witness for appellant, were eye witnesses to what happened at the time the team of Noonan and appellant's automobile met, and immediately th

nesses testify, and we are not prepared to say that they were not warranted in thinking as they did from the evidence in the record.

Second, it is next contended that the court erred in refusing to give appellant's peremptory instruction ordered at the close of appellee's evidence and again at the close of all the evidence, directing a verdict in his favor. This instruction raises the question of the care on the part of appellee's interstate for the safety at the time of the accident.

It is contended by appellant that there were eye witnesses to the first accident, and that, therefore, it was error on the part of the court to admit proof of the careful habits of appellee's interstate, and of his skill and experience in the management of horses. The law in this state is pretty well settled that where there are eye witnesses to an accident testimony as to the habits of the person injured are not admissible for the purpose of proving due care on his part. C. & A. R. R. Co., *vs. Larson*, 154 Ill., 386; *Cassidy vs. Adams*, 137 Ill., 404; *Anderson vs. West*, 137 Ill., 404; *Anderson vs. West*, 137 Ill., 404; *Anderson vs. West*, 137 Ill., 404.

The question here is, whether as contemplated by these authorities there were, in fact, eye witnesses to the transaction in this case. It is true that no official witnesses were present, although there were witnesses for appellee, and some for appellant, were the witnesses so wanted at the time and place of the accident and immediately thereafter.

after, but there were no eye witnesses as to what occurred at the time appellee's intestate met the injury that caused his death. We are of the opinion that the question of due care on the part of appellee's intestate was in issue, not only at the time of the meeting of the team and automobile, but also down to the time he met his injury. In other words, the testimony of appellee's witnesses is to the effect that the mules were still running as far as they could see them, and as appellee's intestate was found at the side of the high-way only about one hundred and forty-five yards from the point where the automobile and the mules met, it was a fair inference for the jury to draw that he was thrown from the wagon, and injured as a result of the run-a-way. It, therefore, follows that there were no eye witnesses to the whole of this transaction, and in our opinion, that being the case, it was proper for the court to admit evidence of the careful habits of appellee's intestate for his own safety, and as to his skill and experience in the management of horses, as tending to prove due care on his part. The court, in our judgment, did not err in refusing appellant's peremptory instruction.

Appellant also complains of the giving of appellee's second, fourth and sixth instructions. Appellee's second instruction is to the effect that due care and caution for one's own safety are not necessary to be proven by direct and positive evidence, but may be proven also by facts and circumstances appearing on the \*



after, but there were no other witnesses to the fact  
occurred at the time of the accident. The fact of  
the injury that caused the death of the horse is the  
opinion that the question of the date of the fact  
of appellee's interest in the horse, not only at  
the time of the meeting of the court was favorable  
but also down to the time of the fact.  
In other words, the testimony of appellee's  
necessity is to the effect that the horse was still  
running as far as the fact of the fact, and as  
appellee's interest was found at the time of  
the high-way, only about one hundred and fifty  
yards from the point where the horse was  
the mile, it was a fact, therefore, that the  
jury to draw that the horse was there at the time,  
and injured as a result of the fact, it  
therefore, follows that there was no question  
necessity to the whole of this transaction, and in  
our opinion, that being the case, it was proper  
for the court to admit evidence of the fact  
facts of appellee's interest in the horse and safety,  
and as to the fact of the fact of the fact,  
fact of horses, as being, to the fact of the fact  
his part. The court, in our judgment, could not  
err in refusing appellee's testimony in this case.  
We must also consider the fact of the fact  
of appellee's second, third and fourth transactions.  
In the appellee's second transaction is the fact  
effect that due care and attention for the fact  
safety are not necessary to be given to the fact  
and positive evidence, but may be given to the fact  
facts and circumstances as being in the fact.

This, we think, is a correct statement of the law and there was no error in the giving of this instruction.

Appellee's fourth and sixth instructions were to the effect that it is the duty of a driver of an automobile to give reasonable warning of his approach when meeting teams on the public highway. The only argument advanced by appellant against these instructions is that they are not based on the evidence. This objection is not well taken, for the reason that there was testimony to the effect that no warning was given. True this testimony was of a negative character, yet while negative <sup>testimony</sup> is not of as much weight as positive testimony upon questions of this kind, still it has always been recognized by the courts as proper to be considered by the jury. There was, therefore, no error in the giving of these two instructions.

Appellant also complains of the refusal of the court to give his seventh instruction. This instruction is as follows: "The jury are instructed that they are the sole judges of the credibility of the witnesses, and if they find and believe from the evidence that any witness had testified falsely as to any material fact, they are at liberty to disregard all the evidence of such witness." It was not error to refuse this instruction as it does not state the law correctly. In order to make this instruction a correct one, it would be necessary to add, "except in so far as their testimony may be corroborated by other credible witnesses, or"



and there was no error in the giving of this information.

approach when meeting teams on the public highway. Of an automobile to give reasonable warning of his were to the effect that it is the duty of a driver employee's fourth and sixth instructions.

The only argument advanced by respondent is that these instructions are not based on the evidence. His objection is not well taken, for

of a negative character, yet no negative is not  
that no warning was given. This is entirely ac-  
tually. The reason that there was testimony to the effect

of as much weight as positive testimony from other  
 tions of this kind, still it has always been recog-  
 nized by the courts as proper to be considered by  
 the jury. There was, therefore, no error in the  
 giving of these two instructions.

1. The court is of the opinion that the evidence is sufficient to establish that the defendant is guilty of the crime charged.

The instruction is as follows: "The jury are instructed that they are the sole judges of the credibility of the witnesses, and it is their duty to believe them if they think they are entitled to do so."

to any material fact, that he is likely to dis-

not error to state that instruction as given does not state the law correctly. In order to state the instruction a correct one is necessary to

facts and circumstances appearing on the trial." Besides this instruction fails to include the element of "illfulness".

Third,- It is contended by appellant that the court erred in allowing the witnesses to testify as to the careful habits of appellee's intestate, but from what we have already said we do not think that the court erred in admitting this evidence, as we think it was proper in this case as there were no eye witnesses to the entire transaction.

It might further be added that the greater part of this testimony was not objected to at the time it was offered. Specific objection should be made to testimony for its incompetency at the time it is offered and not wait until it is all in and then move to exclude it.

Being of the opinion that the trial court committed no serious error in its rulings on the trial of said cause, or in the giving of its instructions, and there being a sharp conflict in the evidence, we are not inclined to disturb the jury's verdict or the judgment approving the same, and said judgment will therefore be affirmed.

Affirmed.

Not to be reported in full.

facts and circumstances surrounding the trial.

Further the instruction states that the

effect of the instruction

Third, it is desirable to emphasize

that the court must in giving the instruction

to testify as to the actual facts of the case

interest, but that we have no right to

do not think that the court should be instructed

evidence, as we think it was proper in this case

as there were no other witnesses to the crime

action.

It might further be stated that the

part of this testimony and not the whole of it

time it was offered. The instruction should be

made to testify for the instruction of the

time it is offered and not until it is all in

and then come to exclude it.

One of the reasons that the trial court

committed no error in giving the instruction on the

trial of said case, or in the fact that the

questions, and there being a right to object to

the evidence, as was not indicated to be such in

jury's verdict on the instruction given in the case,

and said judgment will be affirmed.

Reversed.

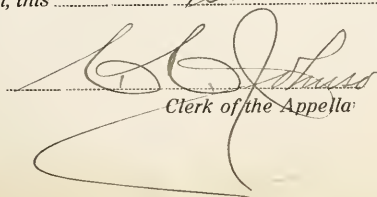
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of

at Mt. Vernon, this ..... 1st ..... day

A. D. 1915.

  
Clerk of the Appellate Court



# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 12th day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 105

~~ERROR TO~~  
APPEAL FROM

No. 24  
March Term, 1915

vs.

Circuit COURT

Jasper COUNTY

Mary Bonner  
Appellee

TRIAL JUDGE

HON. Thos M. Jett





Term No. 23. In the Appellate Court. Ad. 17.  
Fourth District.  
March Term, A.D. 1915.

Geo. S. Richmond,	)	
Appellant,	{	
vs.	{	Appeal from the
Mary Conner,	{	Circuit Court
Appellee	{	of
		Jasper County.

Opinion by Mr. Justice Hogg.

The record in this case discloses that in vacation, after the October Term, 1913, of the Jasper County Circuit Court, Geo. S. Richmond, Appellant, obtained judgment by confession against Mary Conner, appellee, for \$212.74; thereafter, at the October Term 1914, on motion of appellee supported by affidavit and oral testimony heard in open court, said judgment was opened and leave to plead was granted.

Appellee filed a plea of the general issue, and two special pleas setting up want of consideration and fraud and circumvention. A demurrer was sustained to said special pleas and leave was given to appellee to file amended and additional pleas. Three special pleas were then filed setting up as the principal ground of defense that said note was obtained by fraud and circumvention.

tion.

A jury was waived and on trial before the Judge a finding was made for appellee and judgment was rendered against appellant in bar of action and for costs, from which judgment this appeal is prosecuted.

The principal contention of appellant is, first, that the court erred in opening said judgment and in giving leave to plead; second, that the court erred in finding the issues for the appellee on the evidence submitted, instead of for appellant. In other words, that the court was in error on its finding of the facts in the case.

Appellant's first contention for reversal of said cause raises the question of the right of the trial court to open a judgment by confession where a term of court has intervened between the taking of judgment and the motion to open up the same. Upon this proposition it is well settled in this State that Courts of law exercise equitable control over judgments by confession. Kloeckner Vs. Schafer, 110 App. 391; Pearce vs. Miller 201 Ill, 189; Burnswick vs. Hurley, 131 App. 235; Mastin Vs. Richardson 134 App. 252. This rule also obtains after the term has closed and another term has intervened since judgment was confessed. Kloeckner Vs. Schafer, 110 App. 391.

In the case of Kloeckner Vs. Schafer, Supra, it was held by the court that a judgment by confession could be opened up on motion after four

the Judge a finding was made that the defendant was guilty of the crime charged and on that basis a judgment was rendered against the defendant in the sum of \$100.00 and for costs, and the defendant was committed to the State Prison for a term of 10 years.

in other words, that the court was in error on the  
hiding of the facts in the case.

[illegible]

terms of court had intervened since said judgment had been confessed. We think, therefore, that the trial court did not err in opening said judgment and in giving leave to plead, as the equitable grounds set forth in the motion were, in our judgment, sufficient to warrant this action by the court.

Coming now to the second proposition made by appellant, viz: That the court erred in finding the facts for appellee, defendant below, We find that there was a sharp conflict between the testimony submitted by appellant and that submitted by appellee.

The testimony on the part of appellant, plaintiff below, being to the effect that appellee on October 28th, 1912, executed and delivered to one M. B. McDaniel, payee, her promissory note for \$193.50 and that at said time she executed and delivered to him a mortgage upon certain real estate securing the same; that in September 1913, McDaniel sold said note to Emery Andrews, his Attorney, in a business transaction had by them, and Andrews in turn sold said note on October 24, 1913, to appellant, plaintiff below, who on December 8, 1913, obtained judgment by confession against appellee, being in vacation after October term, 1913.

The evidence on the part of appellant is further to the effect that said note and mortgage were executed by appellee voluntarily with a full



terms of court and I have no other said judgment  
has been entered. I think, however,  
that the trial court did not err in its judgment  
and in giving leave to appeal, as the ap-  
pellee grounds set forth in the motion for  
judgment, sufficient to warrant this court in  
the court.

Coming now to the second proposition made  
by appellant, viz: That the court erred in finding  
the facts for appellee, I believe it is  
that there was a sharp conflict of testimony  
submitted by appellant and that appellee  
by appellee.

The testimony on the part of appellant,  
plaintiff below, being to the effect that appellee  
on October 25th, 1912, executed and delivered to  
one J. J. Daniel, aged, her husband, a check  
for \$100.00 and that at said time the check  
and delivered to him a note for \$100.00 and  
estate securing the same; that in October, 1912,  
appellee said note to carry interest, and  
attorney, in business transaction with appellee,  
and Andrew in turn said note to Andrew,  
1912, to appellee, plaintiff below, and on Oc-  
tober 8, 1912, obtained judgment by default  
against appellee, being in vacation after October  
term, 1912.

The evidence on the part of appellee is  
further to the effect that said note and check  
were executed by appellee witness to said note

understanding of the terms and conditions of the same. The evidence on the part of appellee is to the effect that she was an ignorant woman, unable to read but little, and unable to write, and that McDaniel, the payee, in said note, represented to her and her daughter that appellee's son was indebted to him in the sum of \$193.50 and that unless this claim was settled he would have him put in jail. Appellee's evidence is further to the effect that she was delivering to McDaniel a cow at \$50.00, telephone stock at \$25.00 and \$15.00 in money, and that she was to give appellant a note for \$100.00 for the balance, and that appellant produced a note which she understood to be for \$100.00. Her daughter testified that she, too, so understood said note to be for \$100.00, and that McDaniel said to her and her mother, that said note was for said amount.

The seriously controverted question in this case, therefore, is whether or not appellant procured the signature of appellee to the note in question by representing said note to be for \$100.00 instead of \$193.50.

If the testimony of McDaniel, the payee in the note, and of Mr. Land, the police magistrate who accompanied McDaniel to the home of appellee, and who took appellee's acknowledgment to said mortgage, it to be believed, no fraud whatever was practiced on appellee. If, on the other hand, the testimony of appellee and her daughter is to be

understanding of the terms and conditions of the same. The evidence in the case of appellee is to the effect that she was an ignorant woman, unable to read but little, and unable to write, and that McDaniel, the payee, in said note, represented her and her daughter that appellee's son was indebted to him in the sum of \$100.00 and that unless this claim was settled he would have her put in jail. Appellee's evidence is further to the effect that she was delivering to McDaniel in sum of \$50.00, telephone stock at \$25.00 and \$10.00 in money, and that she was to give appellant a note for \$100.00 for the balance, and that appellant received a note which she understood to be for \$100.00. McDaniel testified that she, too, understood said note to be for \$100.00, and that McDaniel said to her and her mother, that said note was for said amount.

The extremely controverted question in this case, therefore, is whether or not appellant procured the signature of appellee to the note in question by representing said note to be for \$100.00 instead of \$105.50.

If the testimony of McDaniel, the payee in the note, and of Mr. Land, the police magistrate, who accompanied McDaniel to the home of appellee, and who took appellee's acknowledgment to said note, is to be believed, it is believed that appellant was practised on appellee. If, on the other hand, the testimony of appellee and her daughter is to be

believed, then said note was either for 100.00 or was represented to them to be for \$100.00 and the signature of appellee was procured with her having that understanding of the amount and terms of the note.

The question being a controverted one, and the evidence being conflicting, the finding of the trial judge, where the jury has been waived, should not be disturbed where no errors of law have intervened, unless such finding is against the manifest weight of the evidence. ✓

In this case, while we are not able to say that our finding on the evidence as disclosed by the record would have been the same as that of the trial judge, still we feel that where the trial judge has seen and heard the witnesses testify, the finding should not be disturbed, unless against the manifest weight of the evidence. This we believe to be the holding both of the Supreme and Appellate Courts of this State. McEand vs. Weinberg, 145 App. 274; Beckley vs. Morton, 140 App. 301; Biggerstaff vs. Biggerstaff, 180 Ill. 407. ✓

After a careful reading of the evidence in this case we are unable to say that the finding of the trial court was against the manifest weight of the evidence. Practically the whole of the testimony material to the issues in this case was given by McDaniel, the payee in said note, and Frank Land, the police magistrate, who testified on the part of the appellant, and the testimony of



believed, then said note was either \$100.00 or was returned to him for \$100.00 and the signature of [redacted] was attached with [redacted] having that understanding at the time and [redacted] of the note.

The question being a controverted one, and the evidence being conflicting, the finding of the trial judge, where the jury has been advised, should not be disturbed where no errors of law have intervened, unless such finding is against the manifest weight of the evidence.

In this case, while we are not free to say that our finding on the evidence as disclosed by the record would have been the same as that of the trial judge, still we feel that where the trial judge has seen and heard the witnesses testify, the finding should not be disturbed, unless against the manifest weight of the evidence. This we leave to be the holding both of the [redacted] appellate courts in this case. See *People v. Berg*, 145 App. Div. 274; *People v. Berg*, 145 App. Div. 274; *People v. Berg*, 145 App. Div. 274.

After a careful reading of the evidence in this case we are unable to say that the finding of the trial court was against the manifest weight of the evidence. Respectfully the whole of the testimony material to the issues in this case was given by [redacted], the negro in white, and Frank [redacted], the police detective, who testified on the part of the appellant, and the testimony of

appellee and her daughter who testified on the part of appellee. The evidence being conflicting, it was for the trial court to say where the truth lay, and to make its finding accordingly.

It follows, therefore, that the judgment of the trial court should be, and the same is affirmed.

Affirmed.

Not to be reported in full.



appellant and her husband who testified on the part  
of appellee. The evidence being conflicting, it  
was for the jury to say where the truth lay,  
and to make its finding accordingly.

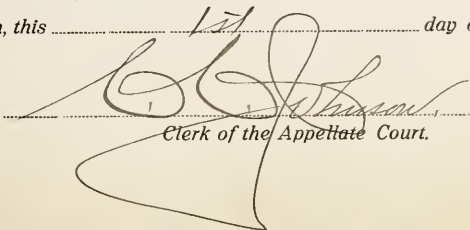
It follows, therefore, that the judgment  
of the trial court should be, and the same is affir-  
med.

affirmed.

not to be reported in this.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

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197A 117

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 117

ERROR TO  
APPEAL FROM

Plaintiff  
vs.  
Appellee

No. 38  
March Term, 1915

Billy COURT

East St. Louis Ry. Co.  
Appellant

East St. Louis COUNTY

TRIAL JUDGE

HON. W. M. Vanderweiler



Clarence Penrod, a Minor,  
By Clara Penrod, his next  
friend,

Appellee.

Vs.

East St. Louis Railway Com-  
pany,

Appellant.

Appeal from the City

Court of East St.

Louis, Illinois.

Opinion by Mr. Justice Boggs:

This is a suit brought by appellee, ~~xxix~~  
suing by next friend, to recover damages for injury  
caused by the alleged negligence of the appellant.  
Appellee was knocked down by one of appellant's cars,  
the wheels of which passed over appellee's hand,  
necessitating the amputation of all the fingers, the  
greater portion of his hand and a portion of his  
thumb.

The declaration consists of two counts. The  
first charges in general terms that the accident was  
due to the negligent operation of appellant's car,  
while the second charges it was due to appellant's  
negligence in failing to give warning of the approach  
of the car, the running of the car at an excessive  
speed, and in failing to keep a proper lookout at the  
point in question; both counts allege due care on  
the part of appellee. The defense relied upon by  
thedefendant was the general issue. The cause was  
tried and a verdict returned for \$4000.00; the motion  
for a new trial was overruled and judgment rendered on



Appeal from the City	{	Clarence Penrod, a minor,
Court of East St.		By Clarence Penrod, his next
Chicago, Illinois.	{	friend,
		Appellee.
	{	vs.
		East St. Louis Railway Com-
	{	pany,
		Appellant.

Opinion by Mr. Justice Holmes:

This is a suit brought by appellee, ~~xxxxxx~~ suing by next friend, to recover damages for injury caused by the alleged negligence of the appellant. Appellee was knocked down by one of appellant's cars, the wheels of which passed over appellee's hand, necessitating the amputation of all the fingers, the greater portion of his hand and a portion of his thumb.

The declaration consists of two counts. The first charges in general terms that the accident was due to the negligent operation of appellant's car, while the second charges it was due to appellant's negligence in failing to give warning of the approach of the car, the running of the car at an excessive speed, and in failing to keep a proper lookout at the point in question; both counts allege due care on the part of appellee. The defense relied upon by the defendant was the general issue. The cause was tried and a verdict returned for \$4000.00; the motion for a new trial was overruled and judgment rendered in

the verdict, from which judgment this appeal was taken.

The evidence discloses that at the time of his injury appellee was about fifteen years of age and was employed by the postal telegraph Company of East St. Louis, in the capacity of errand boy. At the time of the injury he was delivering a message to the Vandalia Railroad Company's freight office, situated on the river front. In delivering the message he went south from the office to Broadway, intending to go west on Broadway to the river front, and thence along the river to the office of the Vandalia Company. The upper deck of the bridge extending from St. Louis to East St. Louis across the Mississippi, known as the Eads Bridge, is used by appellant with its tracks and cars in carrying passengers between the cities of East St. Louis, Illinois, and St. Louis, Mo. The easterly terminus of said bridge is just south of Broadway Street, but the railroad approach to said bridge from East St. Louis angles northeast so that it crosses over Broadway about a quarter of a mile east of the levee, at an angle and at the height of about thirty feet.

On each side of this railroad approach is a wagon approach about twenty feet in width, which starts a little to the ~~west~~ south of the point where the railroad approaches cross Broadway, and ascends to the top of the bridge. These two approaches are public highways, used by the public generally and by the defendant, Company, with its cars in going

the verdict, from which judgment this appeal was taken.

The evidence discloses that at the time of his injury appellee was about fifteen years of age and was employed by the Postal Telegraph Company of East St. Louis, in the capacity of errand boy. At the time of the injury he was delivering a message to the St. Louis and North Western Railroad Company's freight office, situated on the river front. In delivering the message he went south from the office to Broadway, intending to go west on Broadway to the river front, and thence along the river to the office of the Vandalia Company. The upper deck of the bridge extending from St. Louis to East St. Louis across the Mississippi, known as the Eads Bridge, is used by appellant with its trucks and cars in carrying passengers between the cities of East St. Louis, Illinois, and St. Louis, Missouri. The easterly terminus of said bridge is just south of Broadway street, but the railroad approach to said bridge from East St. Louis angles northeast so that it crosses over Broadway about a quarter of a mile east of the levee, at an angle and at the height of about thirty feet.

On each side of this railroad approach is a wagon approach about twenty feet in width, which starts a little to the south of the point where the railroad approaches cross Broadway, and ascends to the top of the bridge. These two approaches are public highways, used by the public generally and by the defendant, Company, with its cars in going

from East St. Louis to St. Louis and return. The defendant Company has a track on each of these wagon approaches-- one of them is used by appellant's cars going from East St. Louis to St. Louis, and the other is used by it in return. The northerly approach is generally used by the appellant in going towards St. Louis, during the summer months, but in bad weather, during the winter, the ice and snow remains on the northerly approach longer than on the south, and during such periods the southerly approach is generally used going towards St. Louis and the northerly approach on returning.

On the day that appellee started to deliver the message to the Vandalia Railroad Company, he passed along the south line of Broadway until he came to said bridge approaches. For a portion of the distance he rode on the back part of an automobile that was going in that direction. He rode up along the southerly approach of said bridge until he came to the public crossing under the railroad approach, where the injury occurred. It was at a point where appellant's car stopped going in either direction to take on or let off passengers. This passageway was used by the general public, both as pedestrians and with teams. When appellee came to this point he stepped off the automobile on which he was riding, and crossed under the railroad superstructure to the northerly approach. The bracing and bric-a-brac work under this portion of the superstructure in a large measure obstructs the view of the cars that might be coming down the incline on the northerly approach. Appellee's view was further



from East St. Louis to St. Louis and return. The defendant Company has a track on each of these approaches--one of them is used by appellant's cars going from East St. Louis to St. Louis, and the other is used by it in return. The northerly approach is generally used by the appellant in going towards St. Louis, during the summer months, but in bad weather, during the winter, the ice and snow remains on the northerly approach longer than on the south, and during such periods the southerly approach is generally used going towards St. Louis and the northerly approach on returning.

On the day that appellee started to deliver the message to the Vandalia Railroad Company, he passed along the south line of Broadway until he came to said bridge approaches. For a portion of the distance he rode on the back part of an automobile that was going in that direction. He rode up along the southerly approach of said bridge until he came to the public crossing under the railroad approach, where the injury occurred. It was at a point where appellant's car stopped going in either direction to take on or let off passengers. This passageway was used by the general public, both as pedestrians and with teams. When appellee came to this point he stepped off the automobile on which he was riding, and crossed under the railroad superstructure to the northerly approach. The bracing and bris-a-banc work under this portion of the superstructure in a large measure obstructs the view of the cars that might be coming down the incline on the northerly approach. Appellee's view was further

obstructed by certain ~~teams~~<sup>gangs</sup> of horses used for, what the drivers call "pull-up" purposes. These teams were standing near the westerly side of this cross street. Appellee testified that he had never noticed the cars going up the southerly approach to the bridge and coming down the northerly approach, and testified he thought they would go up the northerly and come down on the other side; that being the route ordinarily observed in the course of travelling on the highway. When he got off the automobile he started through the cross street, running, or as some of the witnesses described it, in a slow trot. He testified that he was listening for the street car, for the gong of the street car, and as he was about to emerge from under the superstructure upon the northerly approach he, without stopping, looked to the east of him to see if a car was approaching--that being the direction from which he expected the cars to come. By that time he was at or upon the rail of defendant's track on the northerly approach. Almost instantly thereafter he was struck by the car descending the incline upon the northerly approach. The witnesses on the part of appellee testified that as appellant's car approached the crossing no gong was sounded, nor any signal given. The witnesses on the part of appellee ~~XXXXXXXXXXXX~~ estimating the speed of the car as it approached the crossing at from three to four miles per hour to eighteen miles per hour. The evidence on the part of appellee tended further to show that appellee was first knocked down by the car and that he attempted to get up and was



operated by certain <sup>kind of</sup> ~~types of~~ horses used for, what the drivers call "pull-up" purposes. These teams were standing near the western side of this cross street. Appellee testified that he had never noticed the cars going up the southerly approach to the bridge and coming down the northerly approach, and testified he thought they would go up the north-erly and come down on the other side; that being the route ordinarily observed in the course of traveling on the highway. When he got off the automobile he started through the cross street, running, or as some of the witnesses described it, in a slow trot. He testified that he was listening for the street car, for the going of the street car, and as he was about to emerge from under the superstructure upon the northerly approach he, without stopping, looked to the east of him to see if a car was approaching--that being the direction from which he expected the cars to come. By that time he was at or upon the tail of defendant's track on the northerly approach. Almost instantly thereafter he was struck by the car descending the incline upon the northerly approach. The witnesses on the part of appellee testified that as appellant's car approached the crossing no going was sounded, nor any signal given. The witnesses on the part of appellee ~~xxxxxxxxxxxx~~ testified the speed of the car as it approached the crossing at from three to four miles per hour to eighteen miles per hour. The evidence on the part of appellee tended further to show that appellee was first knocked down by the car and that he attempted to get up and was

knocked down again and finally managed to throw himself outside of the northerly rail where he was rolled and dragged by the car. His left hand, coming upon the rail, was run over by the wheels of the front truck.

The car was stopped within half the car's length and he was taken out but his hand was so mangled that amputation was necessary and the portion of the hand heretofore described was removed.

Appellant's track at the point where the injury occurred was within two feet of the superstructure of the bridge and its cars in passing along the superstructure extend within a foot and a half of the same, so that there was only a space of a foot and a half after appellee had emerged on the north side of the superstructure where he could have been the car before getting upon the track. The testimony of appellant's witnesses, most of whom were its employees, was to the effect that the gong was sounded, as the car approached the crossing, and that its speed at that place was only three or four miles per hour; that appellee was running when he passed in front of the car and was not looking either way; that he was within three and one-half feet of the car when he stepped on the track; that the bumper of the car struck him and knocked him down and that the fender caught hold of him and rolled him along the track and pushed him to one side of the north rail; that the car ran about fifteen feet after appellee was struck. The motorman in charge of the car testified that when he saw appellee coming he threw the air into the emergency

knocked down again and finally ran over the three  
himself outside of the northerly rail where he was  
rolled and dragged by the car. His left hand, coming  
upon the rail, was run over by the wheels at the  
front truck.

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superstructure where he could have been the car before  
getting upon the track. The testimony of appellant's  
witnesses, most of whom were its employees, was to  
the effect that the car was rounded, as the car app-  
roached the crossing, and that its speed at that place  
was only three or four miles per hour; that appellee  
was running when he passed in front of the car and  
was not looking either way; that he was within three  
and one-half feet of the car when he stepped on the  
track; that the bumper of the car struck him and  
knocked him down and that the tender caught hold of  
him and rolled him along the track and pushed him to  
one side of the north rail; that the car ran about  
fifteen feet after appellee was struck. The motorman  
in charge of the car testified that when he saw  
appellee coming he threw the air into the emergency

brakes and applied the same; that there was nothing else he could do to stop the car any quicker. This in substance is the testimony in the case.

The Appellant insists, first, that the court erred in refusing to peremptorily instruct the jury to find the issues for the defendant. Second, that the court erred in failing to find that appellee was guilty of contributory negligence, barring his right to recover. Third, that the verdict of the jury was contrary to the manifest weight of the evidence, and fourth, that the court erred in giving instructions on the part of appellee.

<sup>the</sup>  
In view we have taken of this case it will not be necessary to discuss the first proposition as what we have to say on the second and third propositions effectually dispose of the first. The most important question in this case is, as to whether appellee was in the exercise of due care for his own safety at the time the injury occurred.

It is most seriously contended by appellant that he was not, and numerous authorities are cited in support of the various propositions of law which he insists substantiate his position on this proposition. The authorities are all to the effect that before a plaintiff can recover in this character of a case, he must prove that at the time of the injury he was in the exercise of due care for his own safety and that he was not guilty of negligence contributing to his injury.

The questions of due care and of contributory negligence ordinarily do not arise as questions of



brakes and applied the same; that there was nothing else he could do to stop the car any quicker. This in substance is the testimony in the case.

The Appellant insists, first, that the court erred in refusing to peremptorily instruct the jury to find the issues for the defendant. Second, that the court erred in failing to find that appellee was guilty of contributory negligence, barring his right to recover. Third, that the verdict of the jury was contrary to the manifest weight of the evidence, and fourth, that the court erred in giving instructions on the part of appellee.

In view we have taken of this case it will not be necessary to discuss the first proposition as what we have to say on the second and third propositions effectually dispose of the first. The most important question in this case is, as to whether appellee was in the exercise of due care for his own safety at the time the injury occurred.

It is most seriously contended by appellant that he was not, and numerous authorities are cited in support of the various propositions of law which he insists substantiate his position on this proposition. The authorities are all to the effect that before plaintiff can recover in this character of a case, he must prove that at the time of the injury he was in the exercise of due care for his own safety and that he was not guilty of negligence contributing to his injury.

The question of due care and of contributory negligence ordinarily do not arise as questions of

law except where the important facts in the case are undisputed, and it is only in such cases that the court has the right to declare, as a matter of law, that a party was not in the exercise of due care or that he was guilty of contributory negligence. J. C. R. R. Co., Vs. Anderson, 184 Ill. 304; Cicero & Proviso Street Railway Co., Vs. Weixner 160 Ill., 320; Wabash Railway Company Vs. Brown, 152 Ill., 484; Lamson Vs. Ill. Trust & Savings Bank, 166 Ill., 165.

In this case, however, the question of due care and contributory negligence, we think, under the authorities, is preeminently a question of fact to be determined by the jury. If, as the testimony of appellee's witnesses tends to show, appellant's car was approaching the crossing in question at a high rate of speed, without sounding a gong or giving any other signal, and if appellee before approaching the crossing stopped and listened for the ringing of the gong of appellant's street cars and if appellee, expecting the cars, if any, to be approaching from the east, looked in that direction, then in view of the admitted facts, that the tracks of appellant's street car line ran within two feet of the superstructure of the bridge, and that the lattice work of the superstructure of the bridge practically shut off the view of persons approaching said crossing, we think the jury would be warranted in finding that appellee was in the exercise of due care for his own safety and that the appellant



law except where the important facts in the case are undisputed, and it is only in such cases that the court has the right to declare, as a matter of law, that a party was not in the exercise of due care or that he was guilty of contributory negligence. I. C. R. R. Co. v. Anderson, 184 Ill. 304; Cicero & Proviso Street Railway Co. v. Brown, 160 Ill. 320; Wabash Railway Company v. Brown, 152 Ill. 484; Jamison v. Ill. Trust & Savings Bank, 166 Ill. 188.

In this case, however, the question of due care and contributory negligence, we think, under the authorities, is preeminently a question of fact to be determined by the jury. If, as the testimony of appellee's witnesses tends to show, appellant's car was approaching the crossing in question at a high rate of speed, without sounding a bell or giving any other signal, and if appellee before approaching the crossing stopped and listened for the ringing of the bell of appellant's street car and if appellee, expecting the cars, if any, to be approaching from the east, looked in that direction in view of the admitted facts, that the tracks of appellant's street car line ran within two feet of the superstructure of the bridge, and that the lattice work of the superstructure of the bridge practically shut off the view of persons approaching said crossing, we think the jury would be warranted in finding that appellee was in the exercise of due care for his own safety and that the appellant

was guilty of the negligence, which resulted in the injury complained of. Dukeman V. C. C. C. & St. L. Ry. Co., 237 Ill., 108; C. & N. W. Ry. Co. Vs. Gunderson, 174 Ill., 498; Donelson Vs. E. St. Louis Ry. Co., 235 Ill., 625; C. & N. W. Ry. Co., Vs. Dunleavy, 129 Ill. 132; Henry, Admr. V. C. C. C. & St. L. Ry. Co., 236 Ill., 219.

In the case of Henry v. C. C. C. & St. L. Ry. Co. supra, at page 222, the Court in passing on the question raised as to whether or not appellee's intestate was in the exercise of due care for his own safety at the time of the injury which caused his death says; "The view of appellee's intestate as he approached the appellant's right of way was partially obstructed. A party with a two-horse team, who had just passed him, drove across the right of way of the appellant without apparent danger, and no warning was given said intestate of the approaching train. It cannot be said, we think, therefore, as a matter of law, that he was guilty of such contributory negligence in driving upon the appellant's track as to defeat a right of recovery, or that he acted, after he found himself upon the track, in such a negligent manner as to bar a right of recovery."

In the case of Chicago and Northwestern Railway Co. Vs. Dunleavy supra, on page 148 the court said; "The question then presents itself whether, it it be admitted that the deceased neither looked nor listened for the train, and also that if he had looked he could have seen it, and if he had

was guilty of the negligence, which resulted  
 in the injury complained of. *Dukeman v. C. C. C.*  
*2 St. L. Ry. Co., 287 Ill., 108; C. C. C. v. C.*  
*Co. v. Gunderson, 174 Ill., 498; Gordon v. C.*  
*St. Louis Ry. Co., 235 Ill., 425; C. C. C. v.*  
*Ry. Co., v. Dunleavy, 129 Ill., 122; Henry, Adm'r.*  
*v. C. C. C. & St. L. Ry. Co., 235 Ill., 219.*  
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listened with his attention concentrated in that direction he could have heard it in time to avoid the accident, such facts would constitute such conclusive proof of contributory negligence on the part of deceased as would have barred a recovery. Undoubtedly, a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se." This case was cited and approved in Henry v. C.C.C. & St. J. Ry. Co., supra.

It must also be borne in mind in the consideration of this case that appellee had a right to assume that appellant would obey the law by ringing the bell or sounding the gong, and that the motorman would have his car under proper control at said time, and appellee would have the right to act accordingly. Chicago City Ry. Co. v. Pennimore, 199 Ill., 17; St. L. P. & U. Ry. Co., vs. Hawley, 106 App. 555; Henry, Admrx. v. C. C. C. & St. J. Ry. Co., 236 Ill., 222.

The courts of this state have also held that it



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It must also be borne in mind in the determination of this case that appellee had a right to assume that appellant would obey the law by ringing the bell or sounding the gong, and that the motorman would have the car under proper control at said time, and appellee would have the right to rely accordingly. Chicago City Ry. Co. v. Remick, 101 Ill. 236, 237; Henry v. City of Chicago, 101 Ill. 236, 237; Henry v. City of Chicago, 101 Ill. 236, 237.

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is incumbent upon those in control of street cars to exercise a greater degree of care and watchfulness at street crossings or intersections than at other places along the route, that while drivers, grip-men or motomen are obliged at all times to exercise reasonable care in the conduct of their cars, the requirement of reasonable care imposes upon them a more exacting attention when they approach street crossings in a crowded city. (Chicago City Railway Co. V. Tuohy, 196 Ill. 410; Chicago City Railway Co. V. Fennimore, 199 Ill. 9; Heidenreich V. Bremner, 260 Ill. 447.)

In the case of Chicago City Railway Co. V. Fennimore, supra. the court held; "that although there was no ordinance or statute limiting the speed at which street cars were allowed to run, yet in each case it was a question of fact for the jury whether under the facts and circumstances of the particular case the rate of speed was or was not dangerous; that a railroad company, in the running of its trains, is always required to use ordinary care and prudence to guard against injury to the persons or property of those who may be rightfully travelling upon the public streets." So that the question in this case as to whether or not the ~~appellant~~ appellant was exercising the proper care in the handling of its cars as it approached the crossing where the injury occurred, having regard for the travel at said point, is a question of fact for the jury. In view of the holding of the courts of this



is incumbent upon the user of a street to exercise a greater degree of care and watchfulness at street crossings or intersections than at other places along the route, that while drivers, grip-men or motemen are obliged at all times to exercise reasonable care in the conduct of their cars, the requirement of reasonable care imposes upon them a more exacting attention when they approach street crossings in a crowded city. (Chicago City Railway Co. v. Tynny, 196 Ill. 410; Chicago City Railway Co. v. Kennimore, 190 Ill. 9; Eidenreich v. Bremer, 260 Ill. 447.)

In the case of Chicago City Railway Co. v. Kennimore, supra, the court held: "that although there was no ordinance or statute limiting the speed at which street cars were allowed to run, yet in each case it was a question of fact for the jury whether under the facts and circumstances of the particular case the rate of speed was or was not dangerous; that a railroad company, in the running of its trains, is always required to use ordinary care and prudence to guard against injury to the persons or property of those who may be rightfully travelling upon the public streets." So that the question in this case as to whether or not the ~~xxxx~~ appellant was exercising the proper care in the handling of its cars as it approached the crossing where the injury occurred, having regard for the travel at said point, is a question of fact for the jury. In view of the holding of the courts in this

State in regard to the question of due care and contributory negligence we are inclined to hold that the question of due care and of contributory negligence on the part of appellee were by the court, in view of the testimony in the case, properly submitted to the jury, and their finding in that regard should not be disturbed, unless on account of other errors of sufficient moment in themselves to cause a reversal. What we have said with reference to the question as to the due care and contributory negligence raised in this case, we think, practically disposes of the errors assigned by appellant charging that the verdict of the jury was against the manifest weight of the evidence.

The evidence of appellee's witnesses, if believed by the jury, is abundantly sufficient to sustain the verdict, and on some of the points involved in the case appellee's witnesses are corroborated by those of appellant. The motorman in charge of appellant's car which caused the injury testified that he was unable to see the appellee until he was on the track on account of the lattice work of the superstructure of the bridge, and if appellant's motorman could not see appellee on that account there is no real good reason why it should be said that appellee should have seen appellant's car before he passed the superstructure, and when he did so he was practically upon the track of appellant where he was injured.

Certain instructions given on behalf of appellee

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work on the superstructure of the bridge, and if  
appellant's motorman could not see appellee on that  
account there is no real good reason why it should  
be said that appellee should have seen appellant's  
car before he passed the superstructure, and when  
he did so he was practically upon the track of  
appellant where he was injured.

Certain instructions given on behalf of appellee

are criticised by appellant but an examination of these instructions satisfies us that no serious error was committed by the court in giving the same. One of the instructions presented an abstract proposition of law, which we think was fairly applicable to the facts in the case, and if so it was good and not error in giving the same. Another of the instructions, it is claimed, singles out a certain point in the evidence and gives it undue prominence. We do not think, however, that the instruction is subject to this criticism, as the matter complained of was whether appellee was negligent in failing to look toward the west as he stepped on appellant's track, but even if it should be held that this instruction should not have been given, the last instruction given on the part of appellant is subject to the same criticism, as it calls attention to whether appellee was negligent in failing to watch for the car. Neither of these instructions, we think, can seriously be complained of.

A careful examination of this record satisfies us that the trial court committed no serious error and that the question of due care and contributory negligence on the part of appellee and the question of negligence of the appellant were properly submitted to the jury, and that their finding should not be disturbed.

The judgment will therefore be affirmed.

Not to be reported in full.



are criticized by appellant but an examination of these instructions as given to the jury shows that no serious error was committed by the court in giving the same. One of the instructions presented an abstract proposition of law, which we think was fairly and properly stated in the facts in the case, and if so it was good and not error in giving the same. Another of the instructions, it is claimed, singles out a certain point of the evidence and gives it undue prominence. We do not think,

however, that the instruction is subject to this criticism, as the matter complained of was whether appellee was negligent in failing to look toward the west as he stepped on appellant's track, but even if it should be held that this instruction should not have been given, the last instruction given on the part of appellant is subject to the same criticism, and calls attention to whether appellee was negligent in failing to watch for the car. Neither of these instructions, we think, can seriously be complained of.

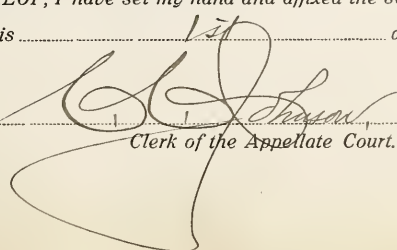
A careful examination of the record establishes us that the trial court committed no serious error and that the question of due care and contributory negligence on the part of appellee and the question of negligence of the appellant were properly submitted to the jury, and that their finding should not be disturbed.

The judgment will therefore be affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.



# OPINION

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197A 119

1236

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 121 day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 119

ERROR TO  
APPEAL FROM

*Amos Jones*  
*Appellant*

vs.

No. 42

March Term, 1915

*Billy*

COURT

*Alton*

COUNTY

*Lothie Veck et al*  
*Appellees*

TRIAL JUDGE

HON.

*James E. Dunnigan*



Amos Jones,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal from the City
	)	
Lottie Veeck, Julius F.	)	Court of Alton,
Veeck, Julius Veeck, and	)	
Rosa L. Veeck,	)	
	)	
Appellees.	)	

Opinion by Mr. Justice Boggs:

This is an action in attachment brought by Appellant, plaintiff below, against appellees, defendants below, to recover a real estate commission claimed by appellant to be owing to him from appellee. The suit was originally brought before a justice of the peace and appealed from there to the City Court of Alton where a trial was had resulting in a verdict and judgment was rendered against appellant for costs. From said judgment this appeal is prosecuted.

The evidence shows that appellees were the owners of certain city property in Alton, Illinois, and desiring to sell or exchange the same entered into a written contract with appellant to assist them in disposing of the same, said contract being as follows: "This is an agreement between Amos Jones, first party, Lottie

Amos Jones,  
Appellant,  
vs.  
Lottie Yeck, Julius M.  
Yeck, Julius Yeck, and  
Rosa L. Yeck,  
Appellees.

Opinion by Mr. Justice Jones:

This is an action in attachment brought by Appellant, Plaintiff below, against Appellees, defendants below, to recover a real estate commission claimed by appellant to be owing to him from appellees. The suit was originally brought before a Justice of the Peace and appealed from there to the City Court of Alton where a trial was had resulting in a verdict and judgment was rendered against appellant for costs. From said judgment this appeal is prosecuted.

The evidence shows that appellees were the owners of certain city property in Illinois, and desiring to sell or exchange the same entered into a written contract with appellant and to assist them in disposing of the same, said contract being as follows: This is an agreement between Amos Jones, first party, and

veeck, and husband, and Julius Veeck and wife, second parties. Second parties put store building and dwelling house in Jones' hands for sale or trade for \$6500.00. Jones to receive a commission of \$200.00, if he produces or introduces any one that buys or trades for the property at \$6500.00 or less."

Thereafter, pursuant to his employment appellant procured the making of a contract between Lottie Veeck and one Wm. F. Duncan, by which contract appellee, Lottie Veeck, was to exchange said city property, subject to certain encumbrances, for ten acres of land owned by Duncan which was also encumbered. This contract was afterward signed by Julius Veeck, Sr., and Julius Veeck, jr.

The evidence further shows that appellant was also representing Duncan in this transaction and was to receive a commission of \$100.00 of him if the deal went through. Appellant contends that Julius Veeck, Jr. was aware of this fact, and was also aware of the fact that appellant was expecting commissions from both sides, and that he as agent was representing Lottie Veeck, who held the title to the property owned by the Veecks.

On the other hand appellees insist that they knew nothing about appellant representing Duncan in the transaction, or that he, appellant, was receiving pay from him.

The question as to whether appellees



Veck, and Klaban, and Julius Veck and his second parties. Second parties had at the time the dwelling house in James' hands for sale or trade for \$300.00. James in receiving a commission of \$200.00, in the process of inducing any one that buys or trades for the property at \$3500.00 or less.

Thereafter, pursuant to his agreement, appellant procured the making of a contract between Lottie Veck and one W. E. Duncan, Jr., which contract appellee, Lottie Veck, was to exchange said city property, subject to certain encumbrances, for ten acres of land owned by Duncan which was also encumbered. This contract was afterward signed by Julius Veck, Jr., and Julius Veck, Jr.

The evidence further shows that appellee and was also representing Duncan in this transaction and was to receive a commission of \$100.00 of him if the deal went through. Appellant contends that Julius Veck, Jr. was aware of this fact, and was also aware of the fact that appellant was expecting commissions from both sides, and that he as agent was representing Lottie Veck, and held the title to the property owned by the Vecks.

On the other hand appellee contends that they knew nothing about appellant's transaction, and that he, appellant, was receiving pay from him.

The question as to whether appellee

were cognizant of the fact that appellant was purporting to represent both sides of the transaction is the most important question in the case. If, as contended by appellant, it was known by appellees and consented to by them that he should represent and receive pay from Duncan, as well as them, then, so far as that feature of the case is concerned, it would not defeat appellant's right to recover. If, on the other hand, appellees did not know of, or consent to, his so representing Duncan and receiving pay from him, then that of itself under numerous authorities in this state would defeat his right of recovery. ✓

There being a direct conflict of evidence on that point, it became a question for the jury, and if there were no serious errors in the rulings on the admission of testimony or in the instructions, the judgment on the verdict of the jury should not be disturbed. ✓

While appellant assigned numerous errors on the record he devoted practically the whole of his argument to questions of fact. He wholly abandoned in his argument his assignment of error on the instructions, and, therefore under the rules, we would not be required to give them any attention. However, on examining the record, we find that the jury were fully and fairly instructed on appellant's theory of the case, and we do not believe the court made any serious error in the giving or refusing of instructions. ✓

For some reason the trade between appell-

were cognizant of the fact that appellant was  
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action is the most important question in the case.  
If, as contended by appellant, it was known by  
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jury should not be disturbed.  
While appellant assigned numerous  
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whole of his argument to questions of fact. He  
wholly abandoned in his argument his assignment  
of error on the instructions, and, therefore,  
under the rules, we would not be required to give  
them any attention. However, on examination of the  
record, we find that the jury were misled and unfairly  
instructed on appellant's theory of the case, and  
we do not believe the court made any error in  
the giving or refusing of instructions.  
For some reason the trade between appellee-

ees and Duncan did not go through, but just why, the evidence does not very clearly show, and we do not think on this record it is material. For if appellant fulfilled his part of his contract with appellees, he would be entitled to recover whether the trade with Duncan went through or not, unless he forfeited such right of recovery by taking commissions from both sides with the knowledge of appellees.

Appellant contends the court erred in permitting appellees to offer evidence as to why the Duncan contract fell through. We think, however, the court did that for the reason that the evidence tended to show appellant had misrepresented the Duncan land with reference to road ways, etc., and also that appellant procured appellees to write a letter to Duncan cancelling the contract with Duncan for alleged failure on Duncan's part. This testimony, we think, was competent for the jury in determining whether appellant had forfeited his right to commission.

The question involved in this case being principally questions of fact, and there being no serious error in the rulings of the trial court, we would not be warranted in disturbing the verdict of the jury, unless against the manifest weight of the evidence. We are unable to say that the verdict is against the weight of the evidence, and the judgment is therefore affirmed.

Affirmed.

Not to be reported in full.



ees and Duncan did not do the work, but that they  
the evidence does not clearly show, and we  
do not think on this record it is a fair trial.  
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with appellees, he would be entitled to recover  
whether the trade with appellees was for cash or not,  
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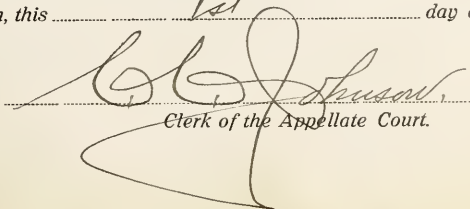
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court, we would not be warranted in disturbing the  
verdict of the jury, unless against the manifest  
weight of the evidence. We are unable to say that  
the verdict is against a weight of the evidence,  
and the judgment is therefore affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.



PINION

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197 A 138

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 12<sup>th</sup> day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Margaret Harroun  
Appellee

vs.

No. 49

March Term, 1915

J. E. Beaton  
Appellant

197 I.A. 138

ERROR TO  
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. Benjamin F. Pope



Margaret Harroun,

Appellee,

Vs.

T. E. Benton,

Appellant.

Appeal from Williamson  
County Circuit Court.Opinion by Mr. Justice Boggs.

This is an action on the case brought by appellee against appellant to recover for injuries to appellee alleged to have been caused by the negligent operation of appellant's automobile.

The declaration consists of six counts, four original and two additional counts. The first count charged the appellant with driving his car at a greater speed than twenty-five miles per hour in violation of the statute; the second count with driving his automobile at a speed in excess of twenty-five miles per hour and with failing to give reasonable warning to appellee of his approach; the third count with driving his automobile along the highway approaching appellee, who was holding her horse, without giving reasonable warning of his approach; the fourth count with driving his automobile at a high and dangerous rate of speed, thereby frightening appellee's horse, and with failing to stop his car after it was apparent that appellee's horse was frightened. The first additional count charges appellee with going around a corner

Appellant.	T. E. Benton,
Vs.	Appellee,
County Circuit Court.	Margaret Barron,
Appeal from Williamson	

Opinion by Justice Rogers.

This is an action on the case brought by appellee against appellant to recover for injuries to appellee alleged to have been caused by the negligent operation of appellant's automobile. The declaration consists of six counts. The first four original and two additional counts. The first count charged the appellant with driving his car at a greater speed than twenty-five miles per hour in violation of the statute; the second count with driving his automobile at a speed in excess of twenty-five miles per hour and with failing to give reasonable warning to appellee of his approach; the third count with driving his automobile along the highway approaching appellee, who was holding her horse, without giving reasonable warning of his approach; the fourth count with driving his automobile at a high and dangerous rate of speed, thereby frightening appellee's horse, and with failing to stop his car after it was apparent that appellee's horse was frightened. The first additional count charges appellee with going around a corner

or curb in the highway where the view was obscured at a rate of speed in excess of six miles per hour; and the second additional count with approaching appellee's horse at a high rate of speed without giving warning of his approach, and with driving past appellee at a dangerous rate of speed while appellee was holding her horse attached to a buggy. all of said counts charge that in consequence of the alleged negligent acts of appellant, the horse of appellee became frightened and appellee was thereby injured. Appellant pleaded the general issue. A trial was had, and a verdict returned for \$700.00 on which verdict a judgment was rendered, and from which judgment this appeal is prosecuted.

The principal grounds relied on by appellant for a reversal of this case are, first, that the verdict was contrary to the manifest weight of the evidence, and second, that the court erred in refusing certain instructions offered on behalf of appellant, and third, that the verdict of the jury is excessive.

*\* It appeared*  
~~The evidence in this case is to the effect~~  
*plaintiff*  
that ~~appellee~~ and a Mrs. Sanders drove to the home of ~~a neighbor~~, a Mrs. Newton, in a one-horse buggy, for the purpose of buying some eggs. Just prior to the accident ~~in question~~ *plaintiff* and Mrs. Sanders were sitting in the buggy on the north side of the road in front of Mrs. Newton's house, talking to Mrs. Newton. The horse and buggy were facing west. While the women were talking Mrs. Newton stated to ~~appellee~~ *plaintiff*



or curve in the highway where the view was obstructed  
at a rate of speed in excess of six miles per hour;  
and the second additional count with approaching  
appellee's horse at a high rate of speed without  
giving warning of its approach, and with driving  
past appellee at a dangerous rate of speed while  
appellee was holding her horse attached to a buggy.  
All of said counts charge that in consequence of the  
alleged negligent acts of appellant, the horse of  
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The principal grounds relied on by appellee  
and for a reversal of this case are, first, that  
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the evidence, and second, that the court erred in  
refusing certain instructions offered on behalf of  
appellee, and third, that the verdict of the jury  
is excessive.

The evidence in this case is to the effect  
that appellee and Mrs. Sanders drove to the home of  
a neighbor, a Mrs. Newton, in a one-horse buggy, for  
the purpose of buying some eggs. Just prior to the  
accident in question appellee and Mrs. Sanders were  
sitting in the buggy on the north side of the road  
in front of Mr. Newton's house, talking to Mr.  
Newton. The horse and buggy were facing west. While  
the women were talking Mrs. Newton stated to appellee

and Mrs. Sanders that an automobile was crossing the bridge. <sup>It appeared that this bridge</sup> ~~This bridge~~ the evidence shows was <sup>about</sup> ~~some~~ five or six hundred feet east of where the horse was standing.

<sup>Plaintiff</sup> The evidence further discloses that <sup>appellant</sup> ~~appellee~~ and Mrs. Sanders at once <sup>alighted</sup> ~~got out of the~~ buggy and <sup>plaintiff</sup> ~~appellee~~ went around to the horse's head, and taking hold of the bridle began leading the horse into a lot at Mrs. Newton's, ~~--- Mrs. Newton opening the gate for that purpose.~~ As to the occurrences up to that time there is but little conflict in the evidence. As to what occurred thereafter the evidence is somewhat conflicting. <sup>Plaintiff</sup> ~~Appellee~~ testified that as soon as <sup>she heard</sup> ~~Mrs. Newton announced~~ that an automobile was coming, ~~that~~ she and Mrs. Sanders at once got out, and she took hold of the horse's bridle; that the automobile ~~driven by appellant~~ was coming at a ~~high~~ rate of speed, estimated by her at from thirty to thirty-five miles per hour; that the horse at once became frightened, and began to kick and plunge and dragged her into the lot and circled around and finally threw her to the ground. <sup>Plaintiff</sup> ~~Appellee's~~ chief injury was to her knee, which she testified was still swollen and caused her pain at the time of the trial some six months after the injury, ~~occurred.~~ \*

Mrs. Sanders testified that the horse did not become frightened until the automobile was opposite or past the buggy; that it then began to rear <sup>Plaintiff</sup> ~~and~~ plunge and finally threw ~~appellee~~ against

and Mrs. Sanders that an automobile was crossing the bridge. This bridge the evidence shows was some five or six hundred feet east of where the horse was standing.

The evidence further discloses that Appellee and Mrs. Sanders at once got out of the buggy and Appellee went around to the horse head, and taking hold of the bridle began leading the horse into a lot at Mrs. Newton's. As to the occurrence up to that time there is but little conflict in the evidence. As to what occurred thereafter the evidence is somewhat conflicting. Appellee testified that as soon as Mrs. Newton announced that an automobile was coming, that she and Mrs. Sanders at once got out, and she took hold of the horse's bridle; that the automobile driven by Appellant was coming at a rate of speed estimated by her at from thirty to thirty-five miles per hour; that the horse at once became frightened, and began to kick and plunge and dragged her into the lot and circled around and finally threw her to the ground. Appellee testified that chief injury was to her knee, which she testified was still swollen and caused her pain at the time of the trial some six months after the injury occurred. Mrs. Sanders testified that the horse

did not become frightened until the automobile was opposite or past the buggy; that it then began to rear and plunge and finally threw Appellee against



the fence. ~~Mrs. Sanders~~ <sup>she further</sup> testified further that the horse was practically through the gate before the automobile passed. ~~Mrs. Sanders~~ <sup>she</sup> also testified that ~~the automobile~~ <sup>the automobile</sup> at the time of the accident was running about the ~~same rate as automobiles ordinarily~~ <sup>ran</sup>, but she could not estimate its speed.

The evidence on the part of ~~appellant~~ <sup>defendant</sup> is to the effect that he was driving his car at a very moderate rate, ~~something like~~ <sup>about</sup> ten or twelve miles per hour; that ~~the horse of appellee~~ <sup>plaintiff's</sup> did not become frightened until after ~~appellant~~ <sup>defendant</sup> had passed and that the horse was inside of the lot ~~at Mrs. Newton's~~ when his automobile passed ~~that place~~. The witness, Spires, brother-in-law of ~~appellant~~ <sup>defendant</sup>, who was with him in his <sup>car</sup>, testified that he saw the women getting out of the buggy and that "it seemed to him like they were getting out of the buggy to get in the clear", that the horse was inside of the lot when they passed and that it did not become frightened until after the machine had passed the buggy. Mrs. Newton testified on behalf of ~~appellant~~ <sup>defendant</sup> that the horse did not become frightened until after the automobile of ~~appellant~~ <sup>plaintiff</sup> had passed. The doctors who treated ~~appellee~~ <sup>plaintiff</sup> were of the opinion that her injuries were not permanent, but that ~~appellee~~ <sup>plaintiff</sup> suffered a ~~great deal of~~ <sup>great</sup> pain, especially with her knee. ~~Q~~

Appellant's brief, consisting of eighty-eight pages, is largely devoted to the argument that the verdict of the jury was against the manifest weight of the evidence, and that the judgment should

the fence. The witness testified that the horse was practically thrown from the back of the automobile passed. The witness also testified that the automobile at the time of the accident was running about the same rate as an automobile ordinarily runs, but she could not estimate its speed.

The evidence on the part of appellant is to the effect that he was driving his car at a very moderate rate, something like ten or twelve miles per hour; that the horse or appellant did not become frightened until after appellant had passed and that the horse was inside of the lot at that time when his automobile passed that place. The witness, Spire, brother-in-law of appellant, who was with him in his car testified that he saw the woman getting out of the buggy and that "it seemed to him like they were getting out of the buggy to get in the clear", that the horse was inside of the lot when they passed and that it did not become frightened until after the machine had passed the buggy.

Mrs. Newton testified on behalf of appellant that the horse did not become frightened until after the automobile of appellant had passed. The doctors who treated appellant were of the opinion that her injuries were not permanent, but that appellant suffered a great deal of pain, especially with her neck.

Appellant's trial, consisting of eight or eight pages, is largely devoted to the argument that the verdict of the jury was against the weight of the evidence, and that the judgment should

be reversed for that reason.

It will be observed from the above statement that there was a sharp conflict in the evidence. This being the case, we would not be inclined to disturb the verdict unless after a careful examination of the evidence, we were able to say that the verdict of the jury is against the manifest weight of the same. As was said in the case of I. C. R. R. Co. Vs. Gillis, 68 Ill., page 319, "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." This language was quoted and approved in *Lourance V. Goodwin*, 170 Ill., 390, and in *Chicago City Ry. Co., Vs. McClain*, 211 Ill., ~~21~~ at page 596.

In the case of *Tolman V. Race*, 36 Ill., page 477, the Court said: "It is the peculiar province of a jury to weigh evidence and reconcile it if possible, or if that cannot be done, then to decide according to the weight of the evidence as it may appear to them. They have so done in this case, and we cannot say their verdict is so manifestly against the evidence as to justify this court in setting it aside." This language was quoted and approved in *Lourance Vs. Goodwin*, 170 Ill., page 393.



be reversed for that reason.

It will be observed from the above

statement that there was a fairly good deal of evidence. This being the case, we would not be inclined to disturb the verdict unless there was some examination of the evidence, or some other fact, that the verdict of the jury is against the weight of the evidence. As was said in the case of

C. R. R. Co. vs. Illinois, 111, 112, 113, 114, 115

any rule of this court can be so well established as to be neither questioned nor limited by the decision

of authorities to support it, it is that a verdict will not be set aside merely because there is a contrary

of evidence, and the facts and circumstances, of a fair and reasonable inference, with reference to the

verdict, notwithstanding it may appear to be against the strength and weight of the testimony. This

language was quoted and approved in Lawrence v. Goodwin, 170 Ill., 390, and in C. R. R. Co. vs. Illinois, 111, 112, 113, 114, 115.

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page 477, the court said: "It is the general principle of a jury to weigh evidence and decide as to

it possible, or if that cannot be done, then to decide according to the weight of the evidence as it

may appear to them. They have no duty to do so in every case, and we cannot say their verdict is in error

testify against the evidence as in this case. This language was quoted in setting it aside. This language was quoted

and approved in Lawrence v. Goodwin, 170 Ill., 390, 391, 392, 393.

No instructions were offered or given on the part of appellee. On the part of appellant twenty one instructions were offered, fourteen of which were given. An examination of the fourteen instructions given on behalf of appellant, we think, disclose that the jury were instructed substantially on every phase of appellant's case. The first and second of the refused instructions offered by appellant are drawn on the theory that the law governing the operation of automobiles along the public highway does not apply to teams on private grounds. There was no error in the Court refusing these instructions, even though appellee's horse was inside of the Lewton lot and the buggy was passing through the gap at the time appellant's automobile passed that place, for the reason that the evidence is to the effect that the horse had been in the public highway and was being led into the lot for the very purpose of getting out of the way of the automobile. If that is the correct inference to be drawn from the evidence, then these instructions would not have been proper.

The third, fourth and fifth refused instructions, so far as applicable, were substantially covered by the instructions given. The sixth instruction directs particular attention to appellee as a witness. Instructions of this character should be general, and should not call particular attention to any special witness. There was no error in the refusal of this instruction.

It is also urged by appellant that the

No instructions were offered or given on the part of appellee. On the part of appellant twenty one instructions were offered, thirteen of which were given. An examination of the thirteen instructions given on behalf of appellant, we think, disclose that the jury were instructed substantially on every phase of appellant's case. The first and second of the refused instructions offered by appellant are drawn on the theory that the law governing the operation of automobiles along the public highway does not apply to teams on private grounds. There was no error in the Court refusing these instructions, even though appellee's horse was inside of the wagon lot and the buggy was passing through the gap at the time appellant's automobile passed that place, for the reason that the evidence is to the effect that the horse had been in the public highway and was being led into the lot for the very purpose of getting out of the way of the automobile. If that is the correct inference to be drawn from the evidence, then these instructions would not have been proper.

The third, fourth and fifth refused instructions, so far as applicable, were substantially covered by the instructions given. The sixth instruction directs particular attention to appellee as witness. Instructions of this character should be general, and should not call particular attention to any special witness. There was no error in the refusal of this instruction.

It is also urged by appellant that the

verdict returned by the jury is excessive. The evidence with reference to the extent of appellee's injuries was more or less conflicting, and while we believe that the verdict was sufficiently large, at the same time, we are unable to say that the jury were unwarranted in fixing the damages at the sum they did. The evidence discloses that in addition to the injuries to appellee's knee, she was otherwise bruised and injured, and that at the time of the trial she was still suffering from these injuries and was more or less disabled on that account.

In our opinion the trial court did not err in refusing appellant a new trial and its judgment is therefore affirmed.

Judgment affirmed.

Not to be reported in full.

verdict returned by the jury is excessive. The evidence with reference to the extent of appellee's injuries was more or less conflicting, and while we believe that the verdict was sufficiently large, at the same time, we are unable to say that the jury were unwarranted in fixing the damages at the sum they did. The evidence discloses that in addition to the injuries to appellee's knee, she was otherwise bruised and injured, and that at the time of the trial she was still suffering from these injuries and was more or less disabled on that account. In our opinion the trial court did not err in refusing appellant a new trial and its judgment is therefore affirmed.

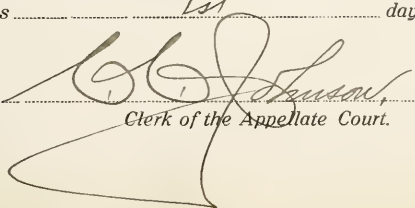
Judgment affirmed.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this .....<sup>15</sup>..... day of December, A. D. 1915.

  
.....  
Clerk of the Appellate Court.



# PINION

PALESTINE

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John Henry,  
Appellee.  
vs.  
No. 71  
March Term, 1915  
Charles Britt,  
Appellant.

197 I.A. 167

~~ERROR TO~~  
APPEAL FROM

Circuit COURT

Pulaski. COUNTY

TRIAL JUDGE

HON. A. W. Lewis.



Case No. 111.

John Henry,	)	
Appellee,	)	
	)	
Vs.	)	-Answered by the Plaintiff's
	)	
Charles Pratt,	)	Attorney at Law,
Appellant.	)	

Opinion by Mr. Justice Tamm

This is an appeal from a decree of the Circuit Court of the United States for the District of Columbia, entered in a case brought to carry in execution, certain property, as described, pursuant to an alleged verbal contract between one Grand Pratt, and deceased, father of said appellee, and appellant.

~~\* John Henry, appellee, vs. Charles Pratt, appellant.~~  
 In equity filed in the Circuit Court of the United States against Charles Pratt, deceased; Margaret A. Brown executrix of the will of A. T. Pratt, deceased; and Barton Bagby, guardian of said Charles Pratt, deceased, on August 1, 1918. J.D. Pratt, ~~was~~ <sup>\* the fil</sup> the plaintiff in the Circuit Court of the United States for the District of Columbia, in a case brought to carry in execution, certain property, as described, pursuant to an alleged verbal contract between one Grand Pratt, and deceased, father of said appellee, and appellant. <sup>Pratt</sup>  
 said and delivered in his answer that a letter, directed to his wife, Nellie I. Pratt, deceased,





[illegible]

The first of these is the fact that the  
 University of Chicago is a private institution  
 and is not subject to the same regulations  
 as public institutions. This fact is of great  
 importance in the case of the University of  
 Chicago, as it is the only one of its kind  
 in the United States.

Secondly, the University of Chicago is a  
 non-sectarian institution, and is not  
 subject to the same regulations as sectarian  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Thirdly, the University of Chicago is a  
 non-profit institution, and is not subject to  
 the same regulations as profit-making  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Fourthly, the University of Chicago is a  
 non-competitive institution, and is not  
 subject to the same regulations as competitive  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Fifthly, the University of Chicago is a  
 non-educational institution, and is not  
 subject to the same regulations as educational  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Sixthly, the University of Chicago is a  
 non-research institution, and is not  
 subject to the same regulations as research  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Seventhly, the University of Chicago is a  
 non-teaching institution, and is not  
 subject to the same regulations as teaching  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Eighthly, the University of Chicago is a  
 non-administrative institution, and is not  
 subject to the same regulations as administrative  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Ninthly, the University of Chicago is a  
 non-legal institution, and is not  
 subject to the same regulations as legal  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

Tenthly, the University of Chicago is a  
 non-moral institution, and is not  
 subject to the same regulations as moral  
 institutions. This fact is of great importance  
 in the case of the University of Chicago, as  
 it is the only one of its kind in the United  
 States.

the bill was filed the defendant Burton Hagby was guardian of Charles Britt, and that the complainant had demanded the execution of a deed, which was refused. The defendant, Margaret A. Brown, executrix of the will of J. W. Brown, deceased, by her answer admitted the making of the conveyance to J. W. Brown, subject to the bond for a deed, his death, and the conveyance by her, as executrix, to Charles Britt, ~~so that there was no controversy as to any matter concerning her or J. W. Brown.~~ The defendants Charles Britt and Burton Hagby, his guardian, answered that they were not informed as to the alleged purchase by the complainant from J. B. Mathis, or the payment of \$173. or of the deed from J. B. Mathis and wife, to A. W. Brown. They ~~made~~ <sup>and</sup> not deny ~~ed~~ the averments of the bill respecting the agreement between the complainant and Grant Britt, and made no answer to such averments, but denied that complainant had performed his obligation or had paid any sum <sup>to</sup> ~~to them or~~ either of them, or on behalf of either of them, on the purchase price of the land, or that he had paid any taxes or assessments, ~~or performed his part of the agreement.~~ They alleged that the only thing that the complainant ever gave them was a few loads of corn paid as rent, and they invoked the Statute of Frauds and Perjuries as against the agreement between the complainant and Grant Britt. \*  
~~There was, therefore, no issue made by the pleadings except the single question whether the complainant had paid the amount due, but, of course, it was~~

the bill was filed the defendant's testimony was  
given at the trial, and the defendant  
had demanded the evidence in a book, which was  
returned. The defendant, however, did not  
list of the evidence, and the defendant  
never admitted the taking of the evidence.  
The bill, subject to the bill for the  
and the conveyance by her, an exception, in which  
bill, ~~and there was no discovery~~ in the  
matter concerning her of the bill. The defendant  
and Charles Witt and Charles Witt, and Charles  
answered that they were not involved in the  
alleged purchase by the defendant from A.  
Lathia, or the payment of \$100. on or about the  
4th of June, 1900. They were not  
not denied at the verdict of the jury regarding the  
agreement between the defendant and Charles Witt,  
and made no answer to such questions, but denied  
that conspiracy and alleged conspiracy of the  
paid any sum ~~to the defendant~~ of the bill, or any part  
of either of them, or the purchase price of the bill,  
or that he had any title or interest in the bill,  
former his part of the agreement. They alleged that  
the only thing that the defendant ever gave them  
was a few loads of corn paid for by the defendant, and they alleged  
the statute of trade and registered on the  
agreement between the defendant and Charles Witt.  
There was, therefore, no issue made by the defendant  
except the single question whether the defendant  
paid the amount due, but, of course, of the

~~necessary for the complainant to prove the facts~~  
~~alleged which were not admitted.~~ The chancellor  
heard the evidence; found the facts as alleged in  
the bill, and stated an account between the complain-  
ant and Charles Britt, and entered a decree finding  
that Charles Britt had attained his majority; that  
the balance due from the complainant was \$35.79, and  
ordering that upon payment of said sum Charles Britt  
execute and deliver a deed of the premises to the com-  
plainant, and in default of such conveyance a special  
master in chancery, appointed for that purpose,  
should execute the deed in his behalf. From that  
decree Charles Britt alone appealed.

+ At the hearing there was no dispute as  
to the making of the bond for a deed, the right of  
the holder of the bond to a conveyance upon payment  
of the stipulated amount, or as to the conveyances  
alleged in the bill. The matter of fact in dispute  
was whether the complainant had repaid the advances  
made to complete the payments on the bond for a deed, +  
and the question of law was whether the contract be-  
tween him and Grant Britt was subject to the defense  
of the Statute of Frauds. The errors assigned and  
argued in this court are, that the oral contract be-  
tween the complainant and Grant Britt could not be  
enforced in a case where the statute of Frauds was  
invoked, as was done in this case; that if Grant  
Britt was a trustee under the alleged agreement it  
was void as an express trust, and that there was no  
resulting trust.

This case was originally appealed to the



...for the...  
...not...  
...heard the evidence;...  
...the bill, and...  
...and...  
...that Charles...  
...the balance due from the...  
...ordering that upon payment of said...  
...execute and deliver a deed of the premises to the...  
...plaintiff, and in default of such...  
...master in equity, appointed for that purpose,  
...should execute the deed in his...  
...decrees that the...  
...of the hearing...  
...to the making of the deed for a...  
...the holder of the deed to...  
...of the stipulated amount, as...  
...alleged in the bill. The...  
...was whether the complaint...  
...made to compel the...  
...and the question of law was whether the contract be-  
...tween him and...  
...of the statute of frauds. The...  
...argued in this court...  
...between the complaint and...  
...enforced in a case where the...  
...involves, as was done in this case;...  
...Brett was a trustee under the...  
...was void as an express trust, and...  
...resulting trust.



Supreme Court on the theory that it was a suit for specific performance and that a fee was involved, but that Court held under the pleadings the fee was not involved and certified the cause to this Court.

If, as contended by appellee, and as found by the trial court, he assigned his bond for deed to Grant Britt, father of Charles Britt, as security to Grant Britt, for a loan of money to pay the balance owing on said bond, and for taxes to be paid by Britt, with the understanding that Britt should take a deed for the premises and hold the same as security until appellee should repay him, then under the decisions of the Supreme Court such an arrangement would amount to a mortgage, and the deed so taken would stand as a security for the money advanced. *Smith V. Cremer*, 71 Ill., 185.

This doctrine was again recognized by the Supreme Court in this case in its holding that no fee was involved. *Henry V. Britt*, 265 Ill., 131. The language of the court being "where a purchaser of land assigns his contract to a third person as security for payments to be made on the contract, and the assignee, on completing the payments, takes from the original vendor an absolute deed of conveyance, the deed will stand as a mere security for moneys advanced, citing *Smith V. Cremer*, supra."

Under this theory, which we believe to be the correct one, this is not a suit for specific performance but in its nature, is a bill to redeem, and if under

...the Court in the theory that it was a matter of  
specific performance and that it was a contract,  
but that Court held under the pleading the law was  
not involved and certified the cause to this Court.

...it, as contended by counsel, and as stated  
by the first court, he assigned his right for bond  
to Grant Witt, father of Elmer Witt, a security  
to Grant Witt, for a loan of money to pay the bond  
and for other purposes, and for other purposes  
by Witt, with the understanding that Grant Witt  
take a deed for the premises and with the understanding  
security, usually given by a third party, and under  
the decision of the Court in the case of *Witt*,  
Grant Witt would be a security for the money advanced.

*Smith v. Greer*, 71 Ill. 185.

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Supreme Court in this case in its holding that no one  
was involved. *Witt v. Witt*, 280 Ill. 180. The  
language of the Court being "there is no question as to  
and assigns his contract to a third party as security  
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assigned, on completing the payments, takes from the  
original vendor an absolute deed of conveyance, the  
deed will stand as a mere security for the money advanced.

*Smith v. Greer*, 71 Ill. 185.

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correct one, this is not a suit for specific performance  
but in its nature, is a bill to redeem, and if order

the authorities above cited the deed taken by appellant is to be held in the nature of a mortgage and as security for payments made by him for the benefit of appellee, the Statute of Frauds would not apply and oral testimony would be admissible under the pleadings.

Appellant practically admits in his pleadings that appellee had the right under the bond given him by Lathis and wife to have received the deed for the premises upon paying the amount stipulated in the bond, but he contends that at no time did appellee pay either his father, Grant Britt, or H. M. Britt, his guardian, or himself, anything on the bond, but that all payments that were made by appellee after the death of Grant Britt, father of appellant, were made on chattel mortgages and other indebtedness owing by appellee to the said Grant Britt.

We are inclined to believe that the trial court was right in finding that the bond held by appellee was assigned or delivered to Grant Britt, father of appellant, to secure said Britt in advancing the money to pay the balance on the bond, taxes, etc., but we do not believe that the trial court stated the account correctly between said parties.

We are mindful of the ~~xxx~~ rule recognized by the courts as to the weight to be given to the finding of the trial court, who sees and hears the testimony of the witnesses appearing on the trial, but we also recognize the rule that it is the duty of





the Appellate Court, if it believes that the finding of the trial court is against the manifest weight of the evidence to set such finding aside. ~~to the trial court charged appellee with principal, interest and taxes in the sum of \$1099.00 and credits him as follows; Amount paid to Grant Britt \$181.00; interest on same, 7% from date of payment to date of decree, \$76.02 and with \$300.00 paid to R. . . Britt, guardian of Charles Britt, with interest on the same from the date of payment to-wit: May 30, 1909, to the date of the decree, \$93.00 and also credited him with 43 loads of corn at eighteen bushels per load at fifty cents per bushel, \$287.00, with interest on same, \$27.09, making a total credit of \$1064.11, leaving a balance owing by appellee to appellant of \$35.79.~~

We believe the court was warranted in making the finding with reference to all of the credits with the exception of the credit of \$300. alleged to have been paid to R. B. Britt, guardian, and the \$93.00 interest on the same, and as to those items we believe that the finding of the court was against the manifest weight of the evidence.

No witness testified directly as to this payment, except <sup>Complainant</sup> ~~appellee~~ and his evidence as to this payment is certainly most unsatisfactory.

<sup>Complainant</sup> ~~appellee~~ testified, "I paid \$300. to R. B. Britt."

"I paid him \$300. Every dollar is here on this stick (presenting stick) every notch on this stick is \$1.00" "Q. Where did you get that money?"

the immediate family, it is believed that the interest  
of the trial court is against the immediate family  
of the evidence of the above financial records.  
trial court of the immediate family, interest, interest,  
and the interest in the immediate family, interest,  
him as follows: interest - in the immediate family, interest,  
interest on same, to the date of payment, interest,  
of interest, interest, interest, interest, interest,  
first, payment of interest, interest, interest,  
the same from the date of payment, interest, interest,  
1900, to the date of the interest, interest, interest,  
credited him with an amount of interest, interest,  
interest per year at 10% interest, interest, interest,  
with interest on same, interest, interest, interest,  
credit of 100.00, interest, interest, interest,  
applied to the interest of 100.00, interest, interest,  
he believe the interest was paid in  
making the transfer, with reference to the interest,  
credit with the exception of the interest, interest,  
alleged to have been paid in . . . interest, interest,  
and the 100.00 interest on the same, interest, interest,  
there we believe that the finding of the court was  
against the interest of the interest, interest, interest,  
No witness testified that the interest, interest, interest,  
payment, except interest and interest, interest, interest,  
this payment a certain amount of interest, interest, interest,  
interest, interest, interest, interest, interest, interest,  
paid him 100.00. interest, interest, interest, interest,  
action (prosecuting action) interest, interest, interest, interest,  
is 100.00. interest, interest, interest, interest, interest,



"A. I raised strawberries, peas and beans and shipped them." "Q. Did you pay him 300. at one time?" "A. No, sir. Every time I paid him 10. I would cut ten notches on this stick. Every notch here is a dollar." "Q. When did you put these notches there?" "A. Every time I made a payment."

It was sought to corroborate the testimony of ~~appellee~~ <sup>appellant</sup> with reference to this payment by his sons, Fred, Henry and John Henry, Jr. and his daughter Margaret Henry. Fred Henry testified that he gave his father \$110.00 and that his sister, Margaret, gave her father \$170.00 and that their father, the appellee, had 20.00 making in all 300. and that he took this 300. and paid it to H. M. Britt on the land. The testimony of Margaret is practically to the same effect. However, neither of them testify as being present and seeing the money paid to Britt, but simply that they gave their father the money and that he was going to make the payment to Britt, and that he brought back with him a slip of paper which they called a receipt. This paper is in words and figures as follows: "John Henry to H. M. Britt, \$300.00". John Henry, Jr., who was fourteen years old when he testified, says, that he was with his father when his father delivered some money to H. M. Britt, and he saw them pour the money out on the table and count it, but he does not know how much there was, or for what purpose it was delivered to Britt. ~~and~~ <sup>his</sup> witness was ten years of age at the time the money was alleged to have been paid. ~~Q~~ <sup>+</sup>

... I received ... very much ...  
... in the ... of the ...  
... very ...  
... I would not ...  
... here as ...  
... notices ...  
... it was ...  
... of ...  
... some, ...  
... for ...  
... have ...  
... have ...  
... then, ...  
... and ...  
... first ...  
... practically ...  
... of ...  
... paid ...  
... father ...  
... payment ...  
... a ...  
... paper ...  
... paper ...  
... Henry ...  
... who ...  
... that ...  
... ed ...  
... the ...  
... does ...  
... it ...  
... years ...  
... have ...

Instead of the paper referred to amounting to a receipt, it really would indicate that at the time it was given, appellee John Henry, was indebted to H. B. Britt in the sum of \$300, and we are inclined to think that really was the meaning of the paper. The fact of the matter is, this paper is entitled to but little weight, as the same is not signed by anyone, and there is nothing to show the handwriting and there is really nothing to show how appellee came by this paper, except his own statement.

*also*  
*H. Appeal*  
~~Q The testimony in this case clearly shows~~  
that at the time of the death of Grant Britt, ~~appellee~~ *as Plaintiff* was largely indebted to Britt for different sums of money secured by chattel mortgages, which chattel mortgages came to the possession of H. B. Britt, ~~who acted as administrator of the Grant Britt estate, and the testimony is that they had various transactions with reference to these chattel mortgages, the same being from time to time renewed, and in fact, the evidence shows that at least one of them is still unpaid.~~

*Complainant*  
~~Appellee~~ *A* on his cross examination with reference to these chattel mortgages was asked this question: Q. Was it after Grant Britt's death you made this chattel mortgage. Do you remember being before Mr. Curt to take the acknowledgment, do you remember that? "A. He told me at that time that I did not owe but \$300.00." ~~#~~

*Complainant*  
~~appellee~~ in connection with the chattel mortgages

location of the other parties is uncertain.  
to a record, it is not possible to say  
this is not given, and the other party, who is  
ed to . . . first in the year 1900, and in the  
included in that list, and the amount of the  
paper. The fact of the other party, who is not  
titled to but little more, and the other party, who is  
ned by anyone, and there is no other party, who is  
identifying and there is no other party, who is  
appears to be a party, and there is no other party,  
ment.  
that of the fact of the other party, who is  
was largely intended to give the other party, who is  
money secured by chattel mortgage, and the other party,  
mortgage to the possession of . . . and the other party,  
noted as administrator of the estate of the other party,  
and the testimony is that the other party, who is not  
tome with reference to these facts, and the other party,  
and being from time to time, and the other party,  
the evidence shows that at least one of them is still  
unpaid.  
appears to be a case of examination of the other  
and to these chattel mortgages was made the other  
tion. . . . as it is stated that the other party, who is  
this chattel mortgage. . . . and the other party, who is  
r. Curt to take the other party, who is not  
that . . . he told me at that time that he was  
one but 300.00. . . . and the other party, who is  
in connection with the chattel mortgage

which he owed to Grant Britt in his lifetime, and which were being looked after by E. L. Britt, his administrator.

We think the inference warranted, that at the time referred to, he owed on chattel mortgages the sum of \$300. It is more than probable that the paper referred to in the words and figures, "John Henry to E. L. Britt, \$300.00" had reference to the balance owing on the chattel mortgages. Instead of the testimony of Fred Henry and Margaret Henry with reference to the payment of the \$300. corroborating appellee, we think, that it fails to corroborate him, for if they are correct the payment of \$300. was all made at one time. The money as they say was in six different sacks, \$50.00 in each sack, whereas appellee testifies that he did not pay the money ~~at~~ all at one time, but paid it at different times, and as he stated it, he kept a memorandum of it by making the notches on the stick, each notch to represent one dollar.

~~Over against this testimony is the testimony~~  
D ~~of~~ E. L. Britt, administrator of the estate of Grant Britt, deceased, and for a time guardian of Charles Britt, ~~to the effect that at no time, after the death~~ *testified in*  
of Grant Britt, did ~~appellee~~ *complainant* make him any payments of any kind whatever on this land for deed, ~~and the testimony of Charles Britt~~ *testified*  
~~that at no time did appellee~~ *that* pay him anything on said land. ~~So that, so far as~~  
the evidence with reference to the \$300. payment is concerned, we think, the evidence is wholly insufficient.



which we would be giving credit in the ledger, and  
which were being turned over to the bank, the  
amount of \$300.  
We took the only one of which we had, and  
the time referred to, as well as the amount of  
the sum of \$300. It is now being turned over to  
the bank referred to in the money and interest, which  
entry to J. A. Britt, \$300.00 and interest, and the  
balance of the other entries, which is  
the testimony of the witness, which is  
reference to the amount of the \$300.00, and  
the entry, which is a bill of exchange, and  
for it then the amount of the entry of \$300.00 and  
made at the time. The amount of the entry is \$300.  
different entry, \$300.00 in each entry, which is  
testified that he had not seen the entry, and as to  
one time, he said he had different entries, and as to  
stated it, he said he had different entries, and as to  
notches on the entry, and as to the amount of the  
entry.

~~the entry of \$300.00 and interest, and the~~  
D  
J. A. Britt, which is the entry of \$300.00 and  
Britt, which is the entry of \$300.00 and  
Britt, which is the entry of \$300.00 and  
of entry Britt, which is the entry of \$300.00 and  
any kind whatever to the entry of \$300.00 and  
James Charles Britt, which is the entry of \$300.00 and  
pay his money to the entry of \$300.00 and  
the evidence which is reference to the \$300.00 and  
concerned, we think, the evidence is really in the

The burden of proof being on appellee to prove this payment by a preponderance of the evidence. Then, too, appellee was successfully impeached by at least four witnesses who testified that his reputation for truth and veracity in the community where he resided was bad.

Appellant contended by his evidence, rather than by his pleadings, that the corn delivered by appellee was rent corn, rather than corn paid on the purchase price of the land, and while the evidence on this point is pretty evenly divided, we are inclined to allow the finding of the trial court who saw and heard the witnesses testify to stand, as we are unable to say that the evidence is not sufficient to support the findings.

The decree will be reversed and cause re-manded with direction to the trial court to re-state the account by ~~xxxxxxx~~ striking out the item of \$300. and the interest on the same amounting to \$93.00, making the amount owing by appellee to appellant \$428.79, with interest at the rate of 5% per annum from the date of the decree heretofore entered by the trial court. A reasonable time to be fixed by the court to make said payment, and upon said payment being made, the conveyance to be executed by appellant, Charles Britt, and in default thereof, that a special commissioner be appointed by the court to execute the same.

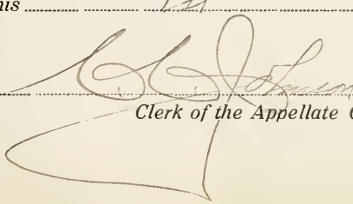
Reversed and remanded, with  
directions.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... 1st ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# PINION





197A 188

1275

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 121 day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 188

ERROR TO  
APPEAL FROM

No. 15 vs.

March Term, 1915

Circuit COURT

Randolph COUNTY

Lucian Cassatt and  
Maggie Cassatt  
Appellees

TRIAL JUDGE

HON. W. E. Hardley



Term No. 15. In the Appellate Court. Agd. no. 5.  
Fourth District.  
March Term, A. D. 1915.

Herschbach Bros.,  
Appellants.

Vs.

Lucian Cassout and Raggie  
Cassout,  
Appellees.

Appeal from the  
Circuit Court of  
Randolph County.

Acbride, J.

~~X~~ This was an action of replevin brought  
by appellants to recover two-thirds of twenty-five acres  
of wheat that had been harvested and ready to  
thresh. The trial court determined the case in  
favor of the appellees. *Plaintiff appeals*

It appears from the record in this case  
that on September 1, 1913, the appellee Lucian  
Cassout, made a mortgage to the State Bank of S. S.  
Gilster & Company, and that in said mortgage was  
included twenty acres of growing wheat. It further  
appears from the evidence that the mortgage, while  
it bore date of September 1st, was not acknowledged  
or recorded until the 11th of October. On the 4th  
day of October of the same year appellees confessed  
a judgment in favor of appellants for the amount  
of \$101.10. Execution was issued and placed in

Term No. 10. In the appellate court. Vol. 10. 10.  
 Court records.  
 Term No. 10. 10.

Appellant. vs. Appellee. Appellant. vs. Appellee.	Appellant. vs. Appellee. Appellant. vs. Appellee.
--	--

Appellant vs. Appellee.  
 This was an action of replevin brought by appellant to recover two-thirds of the wheat that had been harvested and taken to the mill. The trial court determined the case in favor of the appellee.  
 It appears from the record in this case that on September 1, 1915, the appellee, Casson, made a mortgage to the appellant, Claster Company, and that in said mortgage was included twenty acres of farming land. It further appears from the evidence that the mortgage, while its date of recording was September 1st, was not acknowledged or recorded until the first of October. On the day of October 1st the same was recorded and a judgment in favor of appellant for the amount of \$101.10. Execution was issued and returned.

the hands of the Sheriff on the same day and on October 6th, 1913, this execution was served by copy upon the appellees, and upon the same day appellees filed their schedule of personal property and in the schedule is included "25 acres of growing wheat, less rent of one-third", and said schedule also contains the following clause; "Above property belongs to Lucian Cassout, and the mules, wheat and wagon are under mortgage or contract to be mortgage placed on the wheat as soon as sown". On November 19th the appellants caused the aforesaid execution, then in the hands of the Sheriff, to be levied upon the 25 acres of wheat contained in said schedule, and on December 1, 1913, the wheat was sold at public auction by the Sheriff and bid in by plaintiff in the execution at \$107.51. It further appears from the evidence that after the wheat had been cut by the appellee Lucian Cassout, and was ready to be threshed, the appellants sued out this writ of replevin and obtained possession of such wheat. Upon the making of said schedule the sheriff did not select appraisers and the property set forth in the schedule was treated as exempt property. B

It is contended by counsel for appellants in this case that at the time the schedule was made the wheat in question had not been sown and that it was sown after the making of the schedule and prior to October 11th, and that on the



the hands of the sheriff on the same day and  
on October 21, 1913, this document was received  
by copy upon the appellate, and upon the same  
day appellees filed their schedule of personal  
property and in the schedule is included 75 cases  
of growing wheat, less rent of one-third, and  
said schedule also contains the following clause:  
"Above property belongs to Jackson Cascott, and the  
wheat and wheat are under mortgage to the  
first to be mortgage placed on the wheat as herein  
set forth. On October 21, 1913, the mortgage was  
the aforesaid execution, then in the hands of the  
sheriff, to be levied upon the wheat of wheat  
contained in said schedule, and on December 2, 1913,  
the wheat was sold at public auction by the sheriff  
and did in my plaintiff in the execution of \$207.52.  
It further appears from the evidence that after  
the wheat had been cut by the appellee Jackson  
Cascott, and was ready to be threshed, the appellee  
threw out this writ of replevin and of taking  
possession of such wheat. On the 21st of  
said schedule the sheriff did not select any wheat  
and the property set forth in the schedule was  
treated as wheat property.  
It is contended by appellee that the wheat  
in this case was not of the 1st class schedule  
was made the wheat in question and not from  
and that it was never after the cutting of the  
schedule and prior to November 11, 1913, was in the

day the schedule was made no such property was in existence and that by reason of having sown the wheat after the making of the schedule it became additional property acquired by appellee and was therefore subject to levy under appellant's execution, as after acquired property, and that as it was levied upon and sold by the Sheriff to Appellants that they were entitled to recover it in this suit. There is no testimony in this record showing when the wheat was sown, and no proof made upon that question, except the statements contained in the schedule, and it is claimed by counsel for appellants that as the schedule contained the clause "above property belongs to Lucian Cassout, and the mules, wheat and wagon are under mortgage or contract to be mortgage placed on the wheat as soon as sown" that this was proof of the fact that the wheat was sown after the making of the schedule. It is clear from this record that the property of appellees, including the wheat, was exempt from execution. Here the court is satisfied that property is exempt such property ought not to be subjected to sale under an execution, except it is clearly made to appear that the debtor had in some manner forfeited his right to the exemption. There are two clauses in this schedule, the first specifying 25 acres of growing wheat, "less rent of one-third", and the other is the clause above quoted. It also appears that the mortgage referred to bore date of September 1st. Now can it be said that under such circumstances the words, "or contract to be mortgage placed on the wheat as soon as sown" necessarily shows that

day the certificate was made of the property and its  
existence and that the person of record was the  
owner after the death of the person of record.  
Additional property acquired by purchase and was  
therefore subject to levy under execution and was  
execution, as after acquired property, and that as  
it was levied upon and sold by the sheriff to  
Appellants that they were entitled to recover it  
in this suit. There is no testimony in this  
case showing when the wheat was sold, and the  
proof made upon that question, except the state-  
ments contained in the schedule, and it is estab-  
lished by counsel for appellants that the schedule  
contained the clause "above property belongs to  
Indian (name), and the wheat, wheat and corn in  
under mortgage or contract to be sold, are subject to  
the wheat as soon as sold, that it is wheat sold at  
the fact that the wheat was sold after the making  
of the schedule. It is clear from the record  
that the property of appellants, (name) and the wheat,  
was exempt from execution. There is no fact estab-  
lished that property is exempt from execution  
ought not to be subjected to sale under ex-  
ecution, except it is clearly made to appear that the  
debtor had in some manner forfeited his right to  
the exemption. There are two clauses in the  
schedule, the first referring to wheat of record  
wheat, "less rent of wheat," and the other is  
the clause above quoted. It also appears that the  
mortgage referred to bore date of earlier date.  
It can be said that under the first clause  
the words, "or contract to be sold," are included in  
the wheat as soon as sold, "less rent of wheat,"

the wheat was not at that time sown' That statement may as well refer to the terms of the contract with the mortgagee that as soon as the wheat was sown the mortgage would be placed upon it. There was no other proof or testimony offered to show that the wheat had not been sown, and if appellants were relying upon the fact that this wheat was properly acquired after the making of the schedule then they should have shown it to be so by the evidence. It was a matter capable of proof, if that was the fact. Another statement in this schedule to which equal credit should be given says that it was "growing wheat". We do not believe that appellants have shown that this property was afterwards acquired with that clearness that the law requires such facts to be proven when it is sought to deprive a man who is the head of a family, consisting of a wife and five children, of the exemption allowed him by law.

There is another reason which we believe to be equally as important why the appellants should not recover this property and that is, that the sheriff accepted the schedule made by the appellees containing this clause and he knew when he levied upon the wheat in question that it was the same wheat that appellees were seeking by their schedule to hold as exempt property, and if the sheriff were permitted to levy upon this exempt property and sell it under such circumstances then



The wheat was not at that time owned by the plaintiff  
and may as well refer to it in terms of the defendant  
with the suggestion that as soon as the wheat was  
shown the court, it would be placed upon it. There  
was no other proof or testimony offered to show  
that the wheat had not been sold, and if the plaintiff  
were relying upon the fact that this wheat was  
properly accounted after the selling of the schedule  
then they should have shown it to be so by the evi-  
dence. It was a matter of course of proof, it was  
the fact. Another statement in the schedule  
to which credit should be given was that it  
was "growing wheat". We do not believe that plaintiff  
could have shown that this property was afterwards  
accounted with that clearness that the law requires  
such facts to be proven when it is sought to de-  
prive a man who is the head of a family, consist-  
ing of a wife and five children, of the maintenance  
allowed him by law.

There is another reason why the plaintiff  
were to be equally as important as the defendant  
should not recover this property and that is, that  
the sheriff accepted the schedule made by the defendant  
and containing this clause and it was not  
levied upon the wheat in question that it was the  
same wheat that appellees were entitled to. The  
schedule is held as exempt property, and if the  
sheriff were permitted to levy upon this exempt  
property and sell it under such circumstances as



we think that it would be an evasion of the law which requires an officer holding an execution to deal fairly and in good faith with the debtor and not use the provisions of the exemption law to trap or catch debtors who are honestly in good faith seeking to avail themselves of the benefit of its provisions. Langston Vs. Murphy, 31 Ill. App. ~~222~~ 188. The exemption laws are made for the purpose of protecting the poor and unfortunate and should be liberally construed by the courts, and the rights of such debtors should be freely and fully upheld without stint or grudging. Morrissey Vs. Feeley, 36 Ill., App. 556; Gibson Vs. The People, 122 Ill., App. 217; McClellan Vs. Powell, 109 Ill. App. 222.

It is said by the Supreme Court, "We have had frequent occasion, in construing exemption statutes, to say that they are not to be strictly construed, but such construction will be placed thereon as will carry out the obvious purpose of the legislature in enacting them, --to protect the debtor." Minlen vs. Howard, 126 Ill., 259.

We are of the opinion that this record discloses that the property in question sought to be subjected to this execution was in fact exempt under the law, and that the debtor in good faith sought to protect it from execution, and that the

we think that it would be an exercise of the law which requires an officer holding an execution to deal fairly and in good faith with the debtor and not use the provisions of the execution law to trap or catch debtors who are honestly in debt but seeking to avail themselves of the benefit of its provisions. *Anderson et al. v. Brown*, 35 Ill. App. 138. The execution laws are not for the purpose of protecting the poor and unfortunate and should be liberally construed by the courts, and the rights of such debtors should be freely and fully upheld without stint or restriction. *Ortman et al. v. Casey*, 35 Ill. App. 386; *Ortman et al. v. The People*, 137 Ill. App. 71; *Anderson et al. v. Brown*, 109 Ill. App. 232.

It is said by the court in *Ortman et al. v. Casey*, 35 Ill. App. 386:

have had frequent occasion, in construing execution statutes, to say that they are not to be strictly construed, but such construction will be placed thereon as will carry out the obvious purpose of the legislature in enacting them, -- to protect the debtor. *Anderson et al. v. Brown*, 109 Ill. App. 232.

One of the opinions in this case

discusses that the property in question should not be subjected to this execution and is not exempt under the law, and that the debtor in good faith sought to protect it from execution, and that the

appellants ought not to be allowed to subject exempt property to sale under execution, under the circumstances and testimony as disclosed by this record. We believe that substantial justice was done in the trial of the case and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

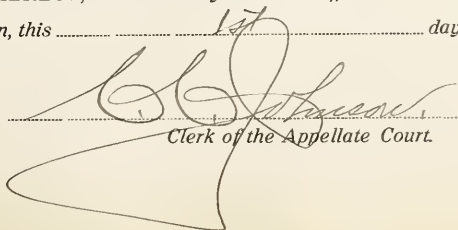
Not to be reported in full.

affidavits ought not to be allowed in evidence  
except property to said lower court, under  
the circumstances and testimony as disclosed by  
this record. The relative testimony in this  
case done in the trial of the case and the  
rest of the lower court is affirmed.  
MAY 1911.

Not to be reported in 1911.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.



PINION

FILED

1881

1881



197 A197

1271

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

- Hon. Harry Higbee, Presiding Justice.
- Hon. James C. McBride, Justice.
- Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

CLERK 1915  
*[Signature]*

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

*A. L. Thompson*  
*Appellant*

ERROR TO  
APPEAL FROM

197 I.A. 197

vs.

No. 26

March Term, 1915

*Circuit* COURT

*Saline* COUNTY

*John Sprague*  
*Appellee*

TRIAL JUDGE

HON. *A. M. Lewis*



## APPELLATE COURT

## FOURTH DISTRICT

OCTOBER TERM, 1914.

- - -

H. I. Thompson,

Appellant,

Vs.

John Sprague,

Appellee.

Appeal from the Circuit  
Court of Saline County.McBride, J.

Appellant brought an action of Forcible Detainer against appellee, before a justice of the Peace of Saline County, August 19th, 1912, to recover possession of certain farm lands in that County. Before the justice, appellant recovered, and appellee appealed to the Circuit Court. At the September Term, 1914, the cause was tried before a jury and a verdict returned in favor of appellee. Motions for a new trial and in arrest of judgment were over-ruled, and judgment entered on the verdict.

Appellee defended on the ground that he was a tenant from year to year, and as such, entitled to sixty days notice to terminate his tenancy before any action could be maintained

IN SENATE

COMMITTEE ON JUDICIARY

REPORT

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Mr. J. J. Thompson,

Chairman,

and

John J. Thompson,

Members.

Report of the Committee

on the Judiciary.

of the

Special Board of Inquiry  
 Report of the Special Board of Inquiry  
 into the case of William J. Thompson, Agent, 1912,  
 in recovery possession of certain lands in  
 that County. Before the Justice, Special re-  
 covered, and applied applied to the Court  
 Court. At the September term, 1912, the case  
 was tried before a jury and a verdict returned in  
 favor of appellee. Motion for a new trial was  
 in arrest of judgment was sustained, and judg-  
 ment entered on the verdict.

Appellee defended on the ground that a  
 was a tenant from year to year, and that he  
 entitled to sixty days notice to terminate his  
 tenancy before any action could be maintained



against him.

It appears from the evidence that appellee rented the premises in question from J. L. Potter, the then owner, sometime about the middle of August 1908, for a period of one year, paying as rents a portion of the various crops raised, delivered in market. The parties do not agree as to just when appellee's tenancy began. At the expiration of the year, appellee continued to occupy the premises. The evidence tends to show that each year, about threshing time, Potter would visit the premises, and he and appellee would go over the farm, and determine what crops should be cultivated in the various portions. This course was followed in 1909, 1910 and 1911. The evidence tends to show that no new leasing either between Potter, and appellee, or between appellant and appellee was ever entered into, although Potter claims that in 1911, he insisted that he should have some rent out of a few acres of pasture. Appellee insists that he did not promise to pay any additional rent, but afterwards did some hauling for Potter, to adjust the matter.

It further appears from the evidence that on the 16th day of August 1909, Potter sold the farm in question to appellant, and executed a warranty deed therefor, which was duly recorded the next day. On the day this deed was made, appellant, by an oral agreement leased the farm to Potter, his grantor, for cash rent, for a period of



one year; at the expiration of that year, a further oral lease was entered into between appellant and Potter for another year at the same terms. At the expiration of the last oral lease, August 17th, 1911, a written lease for one year was entered into between Potter and appellant, beginning August 17th, 1911, and terminating August 17th, 1912.

It further appears from the evidence that all rents due from appellee for said premises have been paid; that such payments were made to Potter, and that appellee has never recognized appellant as his landlord. The evidence tends to show that after Potter deeded the lands to appellant, he continued to exercise the same control and dominion over the farm as he had prior to that time. Appellee testified that he never knew of any leasing between appellant and Potter until about the time this suit was started. He further testified that he never knew of the change of ownership until sometime in December, 1911. It further appears from the evidence, that although appellant acquired title to this farm in 1909, he never visited the premises until in August 1912, and during all of that time, never in any way sought to exercise any control or authority over these lands, except through his dealings with Potter.

Appellant insists that by reason of his purchase from Potter, and his subsequent leasing to

one year; at the expiration of that year, a  
further year was added, and between  
applicant and Hoffer for a total of three years in the  
same manner. In the winter of 1911, applicant was for  
lease, and in 1912, 1913, and 1914, he was for  
one year more, and in 1915, 1916, and 1917, and term-  
applicant, during the years 1918, 1919, and term-  
in the winter of 1920.  
The Hoffer was as follows: and once  
that all rents and other obligations were paid, and  
have been paid; that said applicant was able to  
offer, and that applicant was able to, and  
applicant as his property. The Hoffer was to be  
show that after that date he was to appli-  
net, he continued to be able to offer, and  
and taking on over the same as he was to  
that time. Applicant testified that he never knew  
of any foreign person who was in the winter  
about the time that he was offered, and Hoffer  
testified that he never knew of any person who was in the winter-  
ship until sometime in 1920, and in 1921, it fur-  
ther appears from the evidence, that in 1920, and  
applicant admitted that he was in 1920,  
he never visited the Hoffer until in 1921,  
1922, and taking all of that time, and in 1923,  
will admit to having any contact with Hoffer  
over these years, except through the Hoffer with  
Hoffer.

Applicant testified that he never of his  
purchase from Hoffer, and his application relating to

him, that appellee became a sub-tenant of  
Potter, and that his right to hold said prem-  
ises, expired with the written lease to Potter,  
August 17th, 1912. His contention would be  
sound had appellee's tenancy begun after such  
sale; but when appellant acquired the title,  
appellee was a tenant in possession and appellant  
was chargeable with notice of whatever rights  
he then had. Appellee's tenancy was an interest  
in the land itself, and if his original lease  
for one year, by virtue of a holding over became  
a tenancy from year to year, he could upon  
that ground defend against any one who sought  
to dispossess him without notice. The change of  
title and ownership would not deprive him of  
this defense. We cannot sanction the proposition  
that appellant and Potter, ~~by~~ by virtue of  
secret leaseings between themselves, could change  
appellee's original tenancy into that of a sub-  
tenancy, and thereby substitute for the legal  
rights which he may have acquired in said prem-  
ises, such rights as would accrue to him as a  
subtenant of Potter, under a written lease of  
which he never heard, and of the making of which  
he knew nothing.

Whether or not appellee was a tenant from  
year to year was a question of fact for the jury,  
and was in fact the only issue to be determined  
in the case. The verdict has had the approval of  
the trial court, and we cannot say that it is so



him, that he was the owner of the land. The  
Totten, an estate in fee simple, was  
made, and the land was given to the  
August 17th, 1871. The deed was made  
and the land was given to the  
sole; but when the deed was made, the  
applied for a patent in fee simple and the  
was considered as a matter of course.  
In the land, the land was an interest  
in the land, and it was given to the  
the one year, by virtue of a holding over because  
a tenancy from year to year, he could not  
that ground defend against any one who might  
to dispossess him without notice. The clause of  
title and estate, would not derive him of  
the defense. The clause of estate in the deed  
that appellant and Totten, August 17th, 1871, of  
secret dealing between themselves, and the clause  
appellant's original tenancy from year to year  
tenancy, and thereby substitute for the tenancy  
rights which he had, have acquired in said tenancy  
then, such rights as would accrue to him as a  
appellant of Totten, under a valid lease of  
which he never heard, and at the time of which  
he knew nothing.

Whether or not appellant was bound from  
year to year was a question of fact for the jury,  
and even in fact the only issue to be determined  
in this case. The verdict was for the defendant  
the trial court, and we cannot say that it is so



contrary to the evidence, as to require a reversal on that ground alone.

It is urged that the Court erred in giving the third instruction on behalf of appellee, which told the jury that the burden of proof as to the terms of the lease was upon appellant, and in support of this objection, appellant cites the case of *Leachman vs. Baude, et. al.*, 110 Ill., App. 331. The evidence in that case showed that Leitch, the owner, was in possession of the premises there involved on the 29th of August, 1901, and on that day leased to plaintiffs, for a term beginning January 1st, 1902. In December 1901, after the making of plaintiff's lease, but before they had been let into possession, the defendants in some manner obtained possession of the leased premises. Under the circumstances, there shown, the Court held that it did not devolve upon the plaintiffs to prove the absence of a possessory right in the defendants. The facts in the case cited, and in the case at bar are entirely different. Here appellee was a tenant lawfully in possession at the time appellant acquired the premises. If he were permitted to hold over, he became a tenant from year to year, and as such entitled to notice to quit. Appellant did not make out a *prima facie* case by introducing his deed from Otter, and his written lease to Otter, together with his demand for possession. He was required to go further, and show affirmatively by his evidence that whatever rights appellee

contrary to the evidence, as to require a re-  
versal of the finding.  
It is urged that the evidence is  
giving the jury the impression that the  
appellants, which is the only one that  
practically as to the terms of the lease, the  
appellant, and as to the terms of the lease,  
appellant gives the case to the jury to decide,  
et al., the jury, the jury, the jury in  
that case showed that the jury, the jury, the jury  
possession of the premises, the jury, the jury, the jury  
from August, 1901, to the end of the year, 1901,  
plaintiffs, for a term beginning on the first of January, 1902.  
In December 1901, after the expiration of the lease,  
lease, but before they had been put into possession,  
the defendants in some manner obtained possession  
of the leased premises. The jury, the jury, the jury,  
there shown, the jury, the jury, the jury, the jury  
devolve upon the plaintiff, the jury, the jury, the jury  
of a possession right, the jury, the jury, the jury,  
facts in the case cited, the jury, the jury, the jury,  
are entirely different. The jury, the jury, the jury,  
lawfully in possession of the premises, the jury, the jury, the jury,  
leased the premises. It is urged that the jury,  
hold over, as before a tenant, the jury, the jury, the jury,  
and as such entitled to notice, the jury, the jury, the jury,  
did not make out a valid case, the jury, the jury, the jury,  
has been found, the jury, the jury, the jury, the jury,  
latter, together, the jury, the jury, the jury, the jury,  
he was required to, the jury, the jury, the jury, the jury,  
ly by the evidence that whatever the jury

had in said premises had in fact terminated, the lease being oral, he was required to establish the terms of the lease, so that by knowing the terms of the contract by which appellee held the premises, the Court and jury could determine whether or not that contract had terminated, according to the terms thereof.

We think the instruction complained of, as applied to the facts in this case was proper.

Eighteen instructions tendered by appellant were refused by the trial court, and this is assigned as error. Four instructions were given for appellant, and four for appellee, and when considered as a series the jury were fairly instructed as to the law of the case applicable to the one issue involved, viz; was appellee a tenant from year to year? If he was not, appellant was entitled to recover. If he was, appellee was entitled to the verdict. The testimony and exhibits in this case have been abstracted in ten pages, and appellant's refused instructions occupy seven pages of the abstract. In view of the simple issue submitted to the jury, there was no occasion whatever to burden the trial court with the duty of considering and passing upon such a mass of instructions. Believing as we do, that the instructions given, cover the case, and fully present the issues we deem it unnecessary to discuss the refused instructions. The practice of submitting large numbers of in -

had in mind, however, and not terminated.  
the lease being first, he was returned to the  
establish the terms of the lease, and that by  
knowing the terms of the contract by which  
applies held the premises, the court and jury  
could determine whether or not that contract  
had terminated, according to the terms thereof.  
We think the instruction given is correct,  
as applied to the facts in this case as stated.  
Eighteen instructions tendered by appellant  
were returned by the trial court, and this is assigned  
as error. Four instructions were given for ap-  
pellant, and four for appellee, and when consid-  
ered as a series the jury were fairly instructed as  
to the law of the case applicable to these  
issues involved, viz: was appellee a tenant from  
year to year? If he was not, appellant was  
entitled to recover. If he was, appellee was  
entitled to the verdict. The testimony and ex-  
hibits in this case have been introduced in  
ten pages, and appellant's entire testimony  
occupies seven pages of the record. In view  
of the simple issues submitted to the jury, there  
was no occasion whatever to burden the trial  
court with the duty of considering and passing  
upon such a mass of instructions. We think  
we are, that the instructions given, upon the  
case, and fully present the issues to be decided.  
unnecessary to discuss the alleged error.  
The practice of submitting large numbers of in-

instructions upon single issues has been repeatedly condemned. They tend to confuse rather than to aid the jury in their deliberations. (Chicago City v. Co. vs. Landis, 19 Ill., Apr., 1864.)

It appears that in writing up the judgment in this case, the clerk made a mistake, and instead of writing up the judgment of the Court, as pronounced by the Court, entered judgment that the appeal in this case be dismissed, and stricken from the docket. This error was not discovered until after the close of the term at which the case was tried, and apparently, not until the record for this appeal was prepared. When the mistake was discovered, counsel for appellee gave notice to appellant, and entered his motion to correct the record of the judgment. This motion was allowed, and the record of the judgment corrected, nunc pro tunc as of the 23rd day of October, 1914.

This action of the Court is assigned as error, appellant insisting that at the term at which final judgment was entered and adjourned, the court was powerless, at a future term to in any wise change, modify, or amend its judgment.

It is a sufficient answer to this claim to say that the court neither changed, modified or amended its judgment. What the Court did was to correct the record of its judgment. When it was brought to the attention of the Court, by the



1. The first part of the report deals with the general situation of the country and the position of the various groups of the population. It is a very general and superficial survey, but it gives a good impression of the country and its people.

[illegible]



motion filed, that in entering up this judgment, the clerk had made a mistake, so that the record of the judgment was incorrect, the Court not only possessed the power, but it was its duty to order the Clerk to read and correct the record of the judgment, so that the judgment pronounced by the Court would be correctly shown thereon. (Church et. al., Vs. English, 21 Ill., 442; Befel Vs. the People, 187 Ill., 212; Walter, et. al., Vs. Rozlowski, 211 Ill., 79.)

In reading the testimony in this case we find that appellant testified that when he went to see appellee in August, 1912, he took with him a Mr. Rolands, whom he stated to appellee, had rented the place for the ensuing year, and the object of this visit seems to have been to see if arrangements for possession to Rolands could be made. While this point has not been raised in the briefs filed in the case, it would seem to be decisive of any right in appellant to recover possession. If he had in fact leased to Rolands, he, Rolands, was entitled to possession, and not appellant, and on that ground alone, appellant <sup>had</sup> no right to maintain this suit, or to recover possession. It does not appear that after difficulties arose over getting possession, that Rolands released appellant from his contract, or that the lease between them was abandoned or rescinded. If this is true, Rolands was the only



person, so long as his lease stood with appellant, who could maintain an action for possession. (Gazzolo vs. Chambers, 73 Ill., 75; Thomasson vs. Wilson, 146 Ill., 248; Cobb vs. Bayville, 89 Ill., 331; Reidler vs. Wick, 14 Ill., App. 29.)

For the reasons indicated, the judgment of the Circuit Court is affirmed.

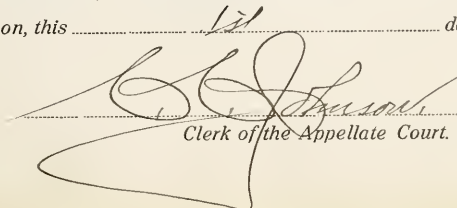
AFFIRMED.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# PINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 199

ERROR TO  
APPEAL FROM

No. 28 vs.

March Term, 1915

Circuit COURT

Gravette COUNTY

TRIAL JUDGE

HON.

Thos. M. Jett



Term No. 28.            In the Appellate Court.    Agd.No.14.  
Fourth District.  
March Term, A.D.1915.

Henry Huss,	)	
Appellant.	)	
Vs.	)	Appeal from the Circuit
J. W. Ford,	)	Court of Fayette County.
Appellee.	)	

McBride, J.

It appears from the record in this case that appellee was the owner of the north west quarter of Section 35, Township 5 North, Range one west of the Third Principal Meridian, in Fayette County, Illinois, subject to a mortgage for the amount of \$2650.00, and that F. H. Hill was the owner of one eight room brick cottage situated on lot ten in Trogdon Addition to the city of Mooresville, Indiana, subject to a mortgage of \$1800.00. That prior to the 13th of December 1912, appellee had told Burrus & Huss, real estate agents at Vandalia, Illinois, that if an opportunity presented itself to sell or trade his land to let him know. That the appellee lived in St. Louis, Missouri and Hill lived at Mooresville, Indiana. Shortly before December 13, 1912, Burrus and Huss communicated with Appellee by telephone and advised him that Hill had this property for trade and explained to him

Henry Jones,  
 Appellant.  
 vs.  
 J. W. Ford,  
 Appellee.  
 Appeal from the Circuit  
 Court of Fayette County.

LeBride, J.

It appears from the record in this case that appellee was the owner of the north east quarter of Section 35, Township 5 North, Range one west of the Third Principal Meridian, in Fayette County, Illinois, subject to a mortgage for the amount of \$250.00, and that J. W. Ford was the owner of one eight room brick cottage situated on lot ten in Tregon Addition to the city of Morrisville, Indiana, subject to a mortgage of \$200.00. That prior to the 13th of December 1911, appellee had sold Burns & Sons, real estate agents at Morrisville, Indiana, that in an opportunity presented itself to sell or trade his land to the said Burns & Sons. That the appellee lived in St. Louis, Missouri and until lived at Morrisville, Indiana. Shortly before December 13, 1912, Burns and Sons communicated with Appellee by telephone and advised him that they had this property for trade and explained to him

the conditions. Appellee then told Burrus & Huss to go and see the property and make the trade. In the conversation over the telephone it was explained to appellee that the commission would be three hundred dollars. After appellee had told Burrus & Huss to make the trade, if the property was satisfactory upon examining it, Burrus & Huss, in the name of Ford and as agents of Ford, entered into a written agreement with P. H. Hill, the owner of the Mooresville property, and agreed to make the exchange, specifying in said agreement the description of the property, the conditions of the trade, that each was to furnish the other with an abstract of title and make conveyance within ten days from the date of the agreement. Said agreement contained the following clause, "Brokerage fees to be paid as follows, to wit: party of the first part (P. H. Hill) to pay Burrus & Huss \$250.00". After having examined the property and on the 15th of December, Burrus & Huss wrote appellee a letter advising him that they found the property at Mooresville really better than expected and advised him that they had closed the deal and enclosed a deed for him to execute to P. H. Hill. The deeds were executed and after the trade was closed appellee not knowing that the contract entered into with Hill contained a clause for the payment of fees by Hill gave to Burrus & Huss a note for \$201.65, dated January 1, 1913, which was the balance due on the contract

the conditions. Appellee then told Burns to go to go and see the property and make the trade. In the conversation over the telephone it was explained to appellee that the commission would be three hundred dollars. After appellee had told Burns to make the trade, if the property was satisfactory upon examining it, Burns then, in the name of Ford and as agents of Ford, entered into a written agreement with J. H. Hill, the owner of the Knoxville property, and agreed to make the trade, specifying in said agreement the description of the property, the conditions of the trade, that each was to furnish the other with an abstract of title and make conveyance within ten days from the date of the agreement. Said agreement contained the following clause, "Brokers fees to be paid as follows, to wit: party of the first part (J. H. Hill) to pay Burns & Huss \$250.00. After having examined the property and on the 15th of February, Burns & Huss wrote appellee a letter stating that they found the property at Knoxville to be better than expected and advised that they had closed the deal and enclosed a deed for the same to J. H. Hill. The deed was executed and after the trade was closed appellee notified that the contract entered into with Hill contained a clause for the payment of ten per cent over to Burns & Huss a note for \$201.40, dated January 1, 1913, which was the balance due on the contract.



after deducting some payments that had been made by Appellee to Burrus & Huss. This note was endorsed by Burrus & Huss to appellant, and is the note sought to be recovered upon in this case.

It was the contention of appellee in the trial below that the note was void for the reason that Burrus & Huss had contracted with him and also with P. H. Hill for the payment of commissions upon this transaction without his knowledge or consent. Upon the trial of the case the plaintiff introduced his note and rested. The defendant then introduced the testimony of Ford, reciting the facts substantially as above set forth, and the contract entered into and prepared by Burrus & Huss as the agents of Ford, with P. H. Hill.

The appellant contended, first.- That Burrus & Huss were acting as brokers and did not sustain that relation with appellee as to prevent them from receiving commissions from the other party. Second,- That the commissions stipulated in the contract above referred to were not in fact coming to them but were being collected by them for one John Janett whom Burrus & Huss claim was the Agent and representative of Hill in this transaction.

The appellant presented propositions of law submitting these questions to the determination of the court, which were refused, and judgment entered against appellant for costs. Upon the first

after deducting some expenses and fees paid by Appellee to certain persons. This note was endorsed by Lurie as cash to appellant, and in the note sought to be recovered from in this case.

It was the contention of appellee in the

trial below that the note was void for the reason

that Lurie & Lurie had conspired with him and

also with E. M. Hill for the payment of commissions

upon this transaction without his knowledge or con-

sent. Upon the trial of the case the plaintiff in-

duced his note and tested. The defendant then

introduced the testimony of Hill, testifying that he

substantially as above set forth, and the contract

entered into and prepared by Lurie & Lurie as the

agents of Lord, with E. M. Hill.

The appellant contended, first, - That

Lurie & Lurie were acting as brokers and did not

maintain that relation with appellee as he claimed

them from receiving commissions from the contract

party. Second, - That the commissions stipulated

in the contract above referred to were not in fact

coming to them but were being collected by them

for one John Janett whom Lurie & Lurie claimed was

the Agent and representative of Hill in this trans-

action.

The appellant presented propositions of

law submitting these questions to the determination

of the court, which were refused, and judgment en-

tered against appellant for costs. Upon the trial

proposition as to whether or not they were brokers and as such entitled to collect fees from both parties, we think the evidence clearly shows that they did not sustain this relation to appellee. That appellee had constituted them his agent, had given them the power to examine the property and determine whether the trade should be made or not, and under such circumstances they clearly could not come within the rule or within any rule that would permit them to contract for commissions with both parties to the transaction; their duty did not consist simply in bringing the parties together but were entrusted with a discretion as to the value of the property, and the holding of the court was proper upon this proposition.

The next proposition submitted, as to the right of appellant to introduce evidence to prove that the amount of money specified in the contract to be paid to Burrus & Huss was not in fact for their benefit but was for the benefit of John Janett. The rule of law governing the admissibility of testimony is that as between the parties to the contract, where it is definite and certain, parol evidence cannot be admitted to vary the terms of the contract but this rule does not apply to third parties or where it is necessary to introduce in evidence such contract, where the action is between third parties. Greenleaf says, "The rule under consideration is applied only in suits between the parties to the instrument, as they alone are to

proposition as to whether or not they were parties  
 and as such entitled to subject themselves to  
 parties, we think the evidence clearly shows that  
 they did not maintain this relation to the estate.  
 That appellee had constituted them his agents, had  
 given them the power to execute the property and  
 determine whether the trade should be made or not,  
 and under such circumstances they clearly would not  
 come within the rule or within any rule that would  
 credit them to contract for commissions with both  
 parties to the transaction; their duty did not  
 consist simply in bringing the parties together  
 but were entrusted with a discretion as to the value  
 of the property, and the holding of the court was  
 proper upon this proposition.

The next proposition is, that, as to the  
 right of appellee to introduce evidence to prove  
 that the amount of money expended in the contract  
 was paid to him, and that he was not to look for their  
 benefit but was for the benefit of John Smith.  
 The rule of law, overriding the admission of the  
 testimony is that as between the parties to the con-  
 tract, where it is definite and certain, the evi-  
 dence cannot be admitted to vary the terms of the  
 contract but this rule does not apply to third par-  
 ties or where it is necessary to introduce in evi-  
 dence such contract, where the action is against  
 third parties. Greenleaf says, "where the action  
 consideration is applied only to enable the parties  
 to the instrument, as they would not be

blame if the writing contains what was not intended or omits that which it should have contained. It cannot effect third parties who if it were otherwise might be prejudiced by things recited in the writing contrary to the truth through the ignorance, carelessness or fraud of the parties; and who therefore ought not to be precluded from proving the truth however contradictory to the written statements of others". Greenleaf on Evidence, Vol. 1, Sec. 279. The evidence in this case, however, shows that Burrus & Huss wrote this agreement, signed it for the appellee and in the appellee's name, and as the agents of appellee, and knew the contents of it and were in a position to know whether or not it was stating the truth and to know whether or not they or any one else might be prejudiced by things recited in the writing contrary to the truth, and while the agreement was in form a contract between Ford and Hill, yet it was in fact a contract made according to the ideas and expressions of Burrus & Huss, without the knowledge or influence of appellee. It also appears that those present at the time of the writing of this contract were Burrus & Huss, Hill and Janett, and if it was being inserted for the benefit of Janett we can see no reason why the name of Janett might not have been used instead of the name of Burrus & Huss.

The trial court heard the testimony of these witnesses, saw their conduct and bearing while



blame if the writing contains what was not intended  
ed or said that which it should have contained.  
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otherwise might be prejudiced by things recited  
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lessness, ignorance or fraud of the parties;  
and who therefore ought not to be presumed from  
proving the truth however contradictory to the well-  
ten statements of others". (Greenleaf on Evidence,  
Vol. 1, Sec. 279. The evidence in this case, how-  
ever, shows that Burrus a bona fide wife appellant,  
signed it for the appellee and in the appellee's  
name, and as the agent of appellee, and knew the  
contents of it and were in a position to know whether  
or not it was stating the truth and so knew  
whether or not they or any one else might be prej-  
udiced by things recited in the writing contrary  
to the truth, and while the agreement was in form  
a contract between Lord and Will, yet it was in  
fact a contract made according to the laws and ex-  
pressions of Burrus laws, without the knowledge or  
influence of appellee. It also appears that appellee  
present at the time of the writing of this contract  
were Burrus a bona fide wife and appellant, and it is well  
being inserted for the benefit of appellant as can  
see no reason why the name of appellant might not have  
been used instead of the name of Burrus a bona fide wife.  
The trial court heard the testimony of  
these witnesses, saw their conduct and manner while



upon the witness stand, and was better able to tell whether or not this was an effort upon the part of Burrus & Huss to collect commissions from both parties in this transactions than we can tell from this record, and he has evidently found that they were endeavoring to do so and we are not disposed to interfere with such finding. The propositions of law submitted to the court embodied the questions that have been decided and determined herein, and we are of the opinion that the court, under the circumstances of the case, correctly determined the propositions of law submitted.

Finding no reversible error in this record the judgment will be affirmed.

JUEGMENT AFFIRMED.

Not to be reported in full.

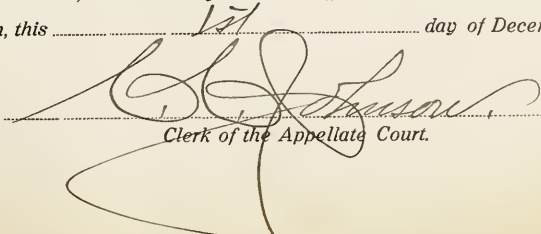
upon the witness stand, and was better able to  
tell whether or not this was an effort upon the  
part of Burns - was to collect testimony  
from both parties in this transaction than we can  
tell from this record, and he has evidently found  
that they were endeavoring to do so and we are not  
disposed to interfere with such finding. The prop-  
ositions of law submitted to the court involved the  
questions that have been decided and determined  
herein, and we are of the opinion that the court,  
under the circumstances of the case, correctly  
determined the propositions of law submitted.  
Finding no reversible error in this record  
the judgment will be affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 15<sup>th</sup> day of December,  
A. D. 1915.

  
Clerk of the Appellate Court.

**NOIINI**

197 A 211

1250

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 211

ERROR TO  
APPEAL FROM

vs.

No. 32

March Term, 1915

Circuit COURT

Perry COUNTY

TRIAL JUDGE

HON. Geo. A. Bior





Term No. 32. In the Appellate Court, Agenda No. 68.  
Fourth District.  
March Term, A. D. 1915.

Nicholas Gill,	)	
Appellant.	)	
Vs.	)	Appeal from the Circuit
John Gill, Sr.,	)	Court of Perry County.
Appellee.	)	

McBride, J.

This is a suit in forcible detainer, brought by John Gill, Sr., appellee, to recover possession of eighty acres of land in Perry County, Illinois, which he claims has been unlawfully withheld from him by his son Nicholas Gill, the appellant. The jury found that appellant was guilty of unlawfully withholding possession of the premises in question and judgment was rendered in favor of appellee for possession of the said premises and his costs.

It appears from the evidence that on October 21, 1904, <sup>Plaintiff</sup> appellee purchased the premises in question from one William McConnell for \$1,550.00. <sup>during</sup> That some time the following March <sup>defendant</sup> appellant took possession of said premises at the request or with



the consent of ~~appellee~~. <sup>Plaintiff Defendant</sup> Appellant claims that the arrangement made between him and his father was that he was to rent the place and give his father one-third of the crops, if the latter needed the same; <sup>Plaintiff</sup> that ~~appellee~~ was to keep up the taxes; <sup>Defendant</sup> that ~~appellee~~ was to have possession of the place as long as <sup>Plaintiff</sup> ~~appellee~~ lived, and it was <sup>that</sup> to belong to <sup>Defendant</sup> ~~appellee~~; That he went on the place under this arrangement, made valuable improvements in expectancy of future ownership, and fulfilled his part of the contract. <sup>Plaintiff</sup> ~~Appellee on the contrary~~ claims that the relation between the parties was that of landlord and tenant; that the tenancy was one from year to year, commencing on the first day of March in each year, and providing for a crop rent. This cause was tried in the court below by the appellant upon the theory that he procured this land from his father, the appellee, for a good and valuable consideration, made improvements thereon, and by reason thereof he was rightfully in the possession of the lands. The appellee tried the case upon the theory that he rented the land to the appellant from year to year, for a crop rent, and that his time expired upon the first of March of each year, and that he was a tenant from year to year. <sup>Plaintiff</sup> That On December 11, 1911, ~~appellee~~ served a written notice upon appellant to vacate said premises on March 1, 1912, which he failed to do.

the consent of the court.

the arrangement made between the parties in 1811 was that he was to rent the place and give the

later one-third of the crop, in the latter needed the land, that he was to keep up

the taxes; that the plaintiff was to have possession of the place as long as he lived, and that the

to belong to the plaintiff; that he was to have under this arrangement, and was to have

in expectancy of future inheritance, and that his part of the contract.

theory claims that the relation between the parties was that of landlord and tenant; that the contract

was one from year to year, commencing on the first day of March in each year, and providing for a certain

rent. This case was tried in the court below, and the plaintiff upon the theory that he received the land from his father, the defendant, for a term and

valuable consideration, and that the defendant, and by reason thereof he was entitled to the

possession of the lands. The defendant claims the case upon the theory that he received the land as a

tenant from year to year, for a certain rent, and that his time expired upon the first day of March in

each year, and that he was a tenant from year to year. That on December 11, 1811, the plaintiff

gave a written notice upon the defendant of his intention to terminate on March 1, 1812, which he failed to do.

That thereafter this suit was instituted.) Upon the trial ~~below~~ the ~~appellee~~ <sup>Plaintiff</sup> objected to the introduction of evidence upon the part of the ~~appellant~~ <sup>defendant</sup> to the effect that he purchased this land under a verbal contract and had made improvements thereon, because it was the making of an equitable defense in the suit at law. The court, however, admitted this evidence over the objections of the ~~appellee~~ <sup>Plaintiff</sup>, and notwithstanding the admission thereof the jury returned a verdict for the appellee. So that as we read the record, the only question left for determination is, Did the appellee rent this land to the appellant from year to year, and did the relation of landlord and tenant exist? If so, then appellee was clearly entitled to recover.

The evidence was conflicting but it appears from the testimony that a greater number of witnesses were introduced on behalf of the ~~appellee~~ <sup>defendant</sup> than ~~appellant~~ <sup>Plaintiff</sup>, and it is now insisted by counsel for appellant that as they had the greater number of witnesses that there was no reason for discrediting the testimony of appellant's witnesses, and that the verdict is manifestly against the weight of the evidence. It is true, the ~~appellant~~ <sup>Defendant</sup> denied specifically that his father rented the land to him as long as he did good on the place but says, "while he came to me and told me to take possession of this place and to farm it as my own farm, that it would be mine at his death" -----.



that thereafter this was a ~~matter~~ <sup>matter</sup>.  
 the trial before the ~~judge~~ <sup>jury</sup> of the ~~fact~~ <sup>fact</sup>  
 of evidence upon the part of the ~~plaintiff~~ <sup>plaintiff</sup>  
 to the effect that he purchased this land under a  
 verbal contract and had made improvements thereon,  
 because it was the claim of an equitable estate  
 in the suit at law. The court, however, directed  
 this evidence over the objection of the ~~plaintiff~~ <sup>plaintiff</sup>,  
 and notwithstanding the fact that the jury  
 returned a verdict for the ~~plaintiff~~ <sup>plaintiff</sup>, in fact we  
 read the record, the only question left for de-  
 termination is, Did the appellee rent this land  
 to the appellant from year to year, and did the  
 relation of landlord and tenant exist? If so,  
 then appellee was clearly entitled to recover.  
 The evidence was conflicting and it appeared from  
 the testimony that a greater number of witnesses  
 were introduced on behalf of the ~~plaintiff~~ <sup>plaintiff</sup> than  
 of the ~~defendant~~ <sup>defendant</sup>, and it is now insisted by counsel for  
 appellant that as they had the greater number of  
 witnesses that there was no reason for disregarding  
 the testimony of appellant's witnesses, and that  
 the verdict is manifestly against the weight of  
 the evidence. It is true, the ~~plaintiff~~ <sup>plaintiff</sup> claimed  
 specifically that his father rented the land to  
 him as long as he did land on the same ~~land~~ <sup>land</sup>,  
 while he came to me and told me to take possession  
 of this place and to farm it as my own land, and  
 it would be mine at his death.



"And if he needed the rent he wanted it and if he did not need the rent I need not pay the rent but I had to pay taxes." He also testified, "He got his rent every year with the exception of the one year he gave me the corn." The next witness introduced by ~~appellant~~ <sup>defendant</sup> was his ~~brother~~ brother John Gill, Jr., who testified, "Why he told me he had bought the McConnel place and was going to give it to Nick, he was going to put Nick on the place." ~~and~~ Upon cross-examination the witness seems to be uncertain whether his father said he was going to rent the place to Nickolas or not, and in answer to the question, "Q.- Did he use the word rent or not? A. I don't know he might have said rent." And while the witness thereafter ~~said~~ <sup>didn't</sup> he ~~didn't~~ think the word rent was used, ~~yet a reading of the whole~~ of his testimony clearly demonstrated that he ~~has~~ did not a very clear recollection of what his father did say. The witness Cartter ~~simply~~ testified that ~~appellee~~ <sup>Plaintiff</sup> talked to him and told him, "He bought a farm, his Perry County eighty acre farm for Nickolas and he said he gave it to Nickolas, and after his death it belonged to Nickolas." The witness Roberts testified, "Why he told me that he had bought Nickolas and John a place and Nickolas was <sup>not</sup> doing to suit him and he was going to be boss." This was a conversation between witness and ~~appellee~~ <sup>Plaintiff</sup> about the trouble they were having in their respective families, and upon cross-examination witness admits <sup>that</sup> his hearing was not very good.



Plaintiff

~~Appellee~~ denied that he had this conversation with this witness. This is substantially all of the evidence in the case and at best the testimony is of that character that is not very reliable because it consists principally of statements made by ~~Appellee~~ which may have been made at statements that were not very well remembered; but in none of these statements nor in the testimony of appellant himself does it appear that any valuable consideration was given for this land or that there was any contract to buy it. The most that appears was that the father intended at some time to give it to the Appellant. Besides, appellant himself admits that he paid the rent every year but one and that year he paid the taxes. This was purely a question of fact to be determined by the jury. If the relation of landlord and tenant existed then the appellee clearly had the right to bring this suit and recover possession of the premises. Owing to the nature of the evidence introduced by the appellant and his conduct in paying rent, which tended to corroborate the statement of appellee, and owing to the further fact that this case has been tried before two juries, each of which found for the appellee, we do not feel warranted in disturbing the verdict.

The question of the right of defendant to make equitable defense in this case is not before us and not considered or determined, as appellee waived all his rights under this phase of the case.

Appellee denies that he has any conversation with this witness. This is substantially all

of the evidence in the case and it may be

testimony is of that character that is not really

reliable because it consists of hearsay of statements that were not very well remembered. One of

none of these statements nor in the testimony of

appellant himself does it seem that any reliable

consideration was given for the fact that

that there was any contract to buy it. The fact

that appellee was that the father intended at

some time to give it to the appellant. Besides,

appellant himself admits that he said the same

every year but one and that year he said the same.

This was purely a question of fact to be determined

by the jury. If the relation of landlord and

tenant existed then the appellee obviously had the

right to bring this suit and recover possession

of the premises. Owing to the nature of the evidence

introduced by the appellee and in answer to the

in paying rent, which tended to corroborate the

statement of appellee, and owing to the further

fact that this case has been tried before two juries,

each of which found for the appellee, we do

not feel warranted in disturbing the verdict.

The question of the right of appellant to

make a counter defense in this case is not before

us and not considered as determined, as appellee

waived all his rights under this issue in the case.

After a full consideration of the case we are of the opinion that substantial justice has been done and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.



After a full consideration of the case  
we are of the opinion that substantial justice  
has been done and the judgment of the lower court  
is affirmed.

UNIONIST AFFIDAVIT.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# OPINION

FILED

1875

1875



8

17A 227

FILED

1252

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 227

~~ERROR TO~~  
APPEAL FROM

vs.

No. 36

March Term, 1915

COURT

COUNTY

TRIAL JUDGE

HON.

James C. Dunnegan

*Take Temple by next friend*  
*Appellee*

*Alton, Granite & St. Louis*  
*Traction Co.*

*Appellant*



Term No. 36.      In the Appellate Court,      Agenda No.53.  
Fourth District.  
March Term, A. D. 1915.

Lake Temple, by	(	
S. C. Temple, his	)	
next friend,	(	
Appellee.	)	
Vs.	)	Appeal from the City Court
Alton, Granite & St.	)	of Alton, Illinois.
Louis Traction Com-	(	
pany,	(	
Appellant.	(	

McBride, J.

The appellee recovered a judgment against appellant in the City Court of Alton, which is sought to be reversed by this appeal. The action arose out of an injury received by appellee caused by the interurban car of appellant coming in contact with an automobile being driven by appellee at the point where appellant's railroad track crosses Ridge Street in Alton, Ill. The tracks of appellant are located upon Second Street, in Alton, Ill., which runs east and west and appellant's car was traveling east upon this street at the hour of about 6:30 P.M. of March 15, 1914. It appears that at the distance of about three hundred feet east of Ridge Street there is a curve in the track of appellant, and that there are many business buildings constructed along the streets near the intersection of Ridge Street with Second Street. The appellee was driving an automobile

Term No. 76. In the month of March, 1914, the  
 Court decided.  
 March Term, A. D. 1914.

	{	Take Temple, by
	{	F. C. Temple, the
	{	next friend,
	{	Appellee.
Respondent from the City of Alton	{	vs.
of Alton, Illinois.	{	Alton Traction & St.
	{	Alton Traction Com-
	{	pany,
	{	Appellant.

Verdict, 1.

The appellee recovered a judgment against  
 appellant in the City Court of Alton, which is sought  
 to be reversed by this appeal. The action arose  
 out of an injury received by appellee caused by the  
 interference of appellant's car with  
 an automobile being driven by appellee in the street  
 where appellant's railroad tracks crossed Fifth Street  
 in Alton, Ill. The location of appellant's tracks  
 is upon Second Street, in Alton, Ill., this street  
 east and west and appellant's car was traveling east  
 upon this street at the time of about 8:30 P. M. of  
 March 10, 1914. It appears that at the distance of  
 about three hundred feet west of where appellant's  
 car was in the line of appellant's car there  
 is a curve in the line of appellant's car and  
 are very narrow business buildings located along the  
 street near the intersection of Fifth Street and  
 Second Street. The appellee was driving an automobile



truck for the Alton Baking & Catering Company and was passing North on Ridge Street and testifies that just before crossing the railroad he looked to see if there was any car approaching but was not able to see one and that he again looked just as his automobile reached the track and the car was then so close to him that he did not have time to pass over or turn back, and when about the center of the track the car struck his automobile, separated the top from the trucks and carried the automobile and the appellee the distance of about sixty feet down the track and injured him. The speed at which the car was being operated was variously estimated at from four miles to twenty miles and it was claimed by some of the witnesses that the automobile was running more rapidly than the car. At all events the testimony upon the question of the speed of the car and of the automobile and the manner in which the car was lighted, or whether lighted at all, and as to the care of the appellee in attempting to cross the tracks, was very conflicting.

The declaration consists of three counts. The first count charges appellant with carelessly, negligently and improperly driving appellants car at such high rate of speed, greater than is reasonable and proper, having regard to the traffic and use of the streets, and so as to endanger the life and limb or injure the property of any person on said street. The second count charges the operation of said car at such a high rate of speed so as to endanger the



life or limb or injure the property of any person in such street, and in violation of Section 10, Chapter 121 of Hurd's Revised Statutes of Illinois, referring to automobiles. The third count charges that appellant before reaching said crossing or intersection of said streets failed to sound a gong or bell on said electric car in disregard and in violation of Section 17 of ordinance 1015 of the ordinances of the City of Alton. Said ordinance provides that all street cars must sound their gong or bell before crossing an intersection of streets, and all cars must approach curves with caution and sound a gong or bell before rounding the curve.

Viewing this case as we do it will have to be reversed upon errors committed by the court in the giving and refusing of instructions and owing to the highly contradictory nature of much of the testimony we deem it improper to comment upon the testimony, except so far as may be necessary to develop the facts in connection with the errors assigned and argued upon the giving of instructions for appellee.

The giving of the first instruction by the court for appellee is assigned as error. <sup>first</sup> ~~This~~ instruction <sup>for plaintiff was</sup> reads as follows: "The court instructs the jury that if you believe from all the evidence in this case that the plaintiff was exercising all due care and caution for his own safety and the safety of others at the time of the injury complained of, or if you further believe from all the evidence in the case that





the defendant through its servants so operating an electric car was careless and negligent at the time and place, namely, the intersection of Second and Ridge Streets, so as to cause the aforesaid injury, if you believe the plaintiff was injured, then your verdict should be for the plaintiff in such amount as you may believe from the evidence he is entitled to receive, not to exceed five thousand dollars, the amount claimed in the declaration." It is objected to this instruction that it does not confine the negligence to that charged in the declaration, and the damages are not limited to a compensatory amount. We think that both objections are well taken to this instruction. As to the former objection, an examination of the declaration will show that there was no charge in the declaration of negligence on account of the improper headlight upon the appellant's car, and there was much evidence introduced on behalf of the appellee and appellant as to the manner in which the car was lighted, and the jury could well consider that they had the right to take this element of negligence into consideration in determining whether or not the defendant was guilty. It was about the time of day that the light would be required and if the jury found that it was negligence in operating a car without a headlight they could very readily determine under this instruction that appellant was liable for such negligence; when in truth and in fact no such negligence is charged in the declaration, and they

the defendant, through the evidence in this case, is  
electric car was broken and broken at the time  
and place, namely, the intersection of Second and  
Third Streets, and as to cause the witness is not  
it you believe the accident was caused, then your  
verdict should be for the plaintiff. Your duty  
as you may believe from the evidence is to find  
to receive, but it would give to the plaintiff  
the amount claimed in the complaint. It is de-  
fined to this instruction that it is not necessary  
the negligence to that caused in the accident,  
and the damages are not limited to a reasonable  
amount. It is the duty of the jury to find  
to this instruction. As to the third question, as  
examination of the defendant will show that they  
was negligent in the defendant's negligence in  
account at the instant accident with the plaintiff's  
car, and there was such evidence introduced in the  
of the accident and believed as to the matter is that  
the car was lighted, and the jury could well believe  
that they had the right to take the amount of the  
liability into consideration in determining whether  
not the defendant was guilty. It was shown that  
of day that the light would be turned on at the  
jury found that it was negligent in not turning on the  
without a headlight they could well reasonably determine  
under this instruction that defendant was liable for  
such negligence; and in fact you find that the  
negligence is charged in the complaint, and they



would have no right to determine the guilt of the defendant upon this act. The instruction was erroneous in not limiting the negligence to that charged in the declaration. It will be observed that the charges in the first and second counts of the declaration were confined to the speed and the third count was failure to sound the gong or bell on the car, and the doctrine that the plaintiff is confined to the specific charges of negligence contained in his declaration is so familiar that it is unnecessary to cite authorities. The second objection to this instruction is that the <sup>a</sup>damages should be limited to such as were sustained by appellee. We think this instruction is erroneous in not limiting the damages of plaintiff to such as to compensate him for the injuries received. *Waldron et al vs. Marcier*, 85 Ill., 550. "The instruction was wrong, upon the point of damages, in telling the jury they might find for the plaintiff such damages as in their judgment, from the evidence in the cause, the plaintiff ought to recover." This left the jury free scope to give such damages as, according to their individual notions of right and wrong, they might think the plaintiff ought to recover, unguided by any legal rule of damages, and without regard to the damages sustained." *Keightlinger Vs. Egan*, 65 Ill., 235. Instructions of this character, including the statement "Not to exceed five thousand dollars" are condemned as erroneous and fully commented upon in the case of *Muren Coal & Ice Co. Vs. Howell*, 204 Ill., 515.

It is urged that the second instruction given on behalf of appellee is erroneous in this, that after having stated the rights of each party to the use of the crossing and the necessary precautions

would have no effect on the liability of the  
defendant upon this point. The instruction was error-  
neous in not limiting the damages to the property  
in the destruction. It will be observed that the  
charges in the first and second counts of the decla-  
ration were confined to the speed and the light con-  
dition was failure to sound the horn or bell on the car,  
and the doctrine that the plaintiff is confined to the  
specific charges of negligence contained in his de-  
claration is so familiar that it is unnecessary to  
city authorities. The second objection to the in-  
struction is that the damages should be limited to  
such as were sustained by appellee. The same in-  
struction is erroneous in not limiting the damages  
of plaintiff to such as he compensated him for the  
injuries received. *Edwards et al. v. Western*,  
111, 550. The instruction was error, upon the  
point of damages, in telling the jury they might find  
for the plaintiff such damages as in their judgment,  
from the evidence in the case, the plaintiff was  
to recover. This left the jury free scope to give  
such damages as, according to their individual opi-  
tions of right and wrong, they might think the plain-  
tiff ought to recover, unaided by any legal rule of  
damages, and without regard to the damages sustained.  
*Keightlinger vs. Ryan*, 65 Ill., 525. Instruction  
of this character, including the statement that he  
exceed five thousand dollars, are condemned as error-  
neous and fully commented upon in the case of *Wheat*  
*Coal & Ice Co. vs. Howell*, 204 Ill., 512.  
It is urged that the second instruction, upon  
on behalf of appellee is erroneous in that, after  
after having stated the rights of each party, it

A The court further instructed  
the jury:

required by each of them the following language is contained in this instruction, to-wit: "And if you further believe from the evidence that the defendant failed to give the required signal in approaching said crossing by ringing a bell or sounding a gong, and that such failure contributed to the accident, then your verdict should be for the plaintiff in such an amount as you believe from the evidence he is entitled to receive, not to exceed the amount claimed in the declaration." It will be observed that all that is required by this instruction to make the defendant liable is that the act of negligence charged contributed to the accident when in truth and in fact it is charged in the declaration that this act caused the injury, and as we understand the law it is not sufficient to create a liability that the act contributed but it must have been the efficient cause of the injury to entitle the plaintiff to recover. "The breach of duty upon which an action is brought must not only be the cause but the proximate cause of the damages to the plaintiff. The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any ~~law~~, independent cause, produced that event, and without which that event would not have occurred". Wabash R.R. Co. vs. Coker, 81 App., 664. Affirmed in the 183 Ill., 223. This instruction also gives the jury the right to assess the damages in such an amount as the jury may believe from the evidence

required by such of them as the instruction is  
contained in this instruction, which is the  
further believe from the evidence that the defendant  
and failed to give the required signal in response to  
the said excessive by ringing a bell or sounding a  
gong, and that such failure constituted the negligence  
of the defendant, then your verdict should be for the plaintiff  
in such an amount as you believe from the evidence  
he is entitled to receive, not to exceed the amount  
claimed in the declaration. It will be observed  
that all that is required by this instruction is that  
the defendant liable is that the act of negligence  
charged constituted the accident when it is true  
and in fact it is charged in the declaration that the  
act caused the injury, and as we understand the law  
it is not sufficient to create a liability for the  
act contributed but it must have been the efficient  
cause of the injury to entitle the plaintiff to re-  
covery. "The breach of duty upon which an action is  
brought must not only be the cause but the proximate  
cause of the damage to the plaintiff. The proximate  
cause of an event must be understood as a cause  
which, in a natural and continuous sequence, unbroken  
by any new, independent cause, produced that event,  
and without which that event would not have occurred."  
Sprecher v. M. Co. v. Coker, 81 App., 654. Affirmed  
in the 183 Ill., 223. This instruction also gives  
the jury the right to award the damages in such an  
amount as the jury may believe from the evidence

plaintiff is entitled to receive, irrespective of the negligence charged in the declaration, and it is in this regard defective for the same reasons assigned as to the first instruction.

It is unnecessary to consider the other objections urged for the reversal of this case for the reason that the errors above considered are sufficient, in our opinion, to require a reversal.

The judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.



maintain it as applied to receive, it is not  
of the negligence charged in the declaration, and  
it is in this regard selective for the same reason  
assigned as to the first instruction.

It is unnecessary to consider the other  
objections urged for the reversal of this case for  
the reason that the errors above considered are  
sufficient, in our opinion, to require a reversal.  
The judgment of the lower court is reversed  
and the cause remanded.

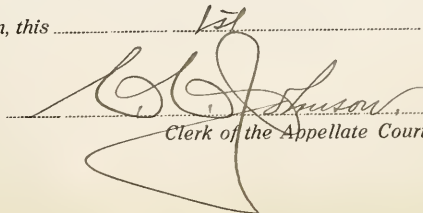
REVEREND AND HONORABLE

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

PINION

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RECEIVED

17453  
1237

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 15 day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 239

~~ERROR TO,~~  
APPEAL FROM

No. 48 vs.

March Term, 1915

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON.

Carl E. Sheldon



In the Appellate Court,  
Fourth District,  
March Term, A. D. 1915.

E. B. Sipes,	)	
Appellee,	)	
Vs.	)	Appeal from Williamson
John Barlow,	)	County, Circuit Court.
Appellant.)	)	

McBride, J.

The plaintiffs recovered a judgment in the Circuit Court for two hundred dollars and costs, which the defendant seeks to reverse.

The declaration ~~in this case~~ <sup>was</sup> ~~is~~ <sup>an</sup> ~~assumpsit~~ <sup>with</sup> and consists of <sup>one</sup> special count and the common counts. It ~~was~~ <sup>was</sup> charged in the special count that on May 29, 1914, ~~appellee~~ <sup>plaintiff</sup> was engaged in the business of moving houses and that on <sup>when</sup> ~~that~~ date the <sup>appellant</sup> ~~appellee~~ employed him to move certain ~~some~~ houses for which appellant agreed <sup>to</sup> pay \$250.00, ~~that~~ <sup>plaintiff</sup> ~~appellee~~ further agreed <sup>as</sup> a part of the consideration to erect and have in place a foundation under the larger house within one week after <sup>the</sup> ~~said~~ house was moved to ~~its future location~~ <sup>at its future location</sup> and placed in position, and that appellant would not <sup>to</sup> ~~require~~ <sup>plaintiff</sup> ~~appellee~~ to keep his house moving tools under ~~said~~ <sup>that</sup> house longer than one week after <sup>the</sup> ~~said~~ house was





~~removed and placed in position. That appellee in~~ <sup>Plaintiff</sup>  
~~compliance with said agreement, removed the~~ <sup>accordingly</sup>  
~~houses within a reasonable time and according to~~  
~~the terms of the agreement. That appellant did~~ <sup>defendant</sup>  
~~not comply with his promise and did not place the~~  
~~foundation under said house within a week, as~~ <sup>the</sup>  
~~agreed upon, and that appellee could not remove~~ <sup>plaintiff</sup>  
~~his house moving tools from under said house until~~ <sup>the</sup>  
~~July 27, 1914. That appellant failed and refused~~ <sup>defendant</sup>  
~~to pay the said amount of \$250.00. Appellee fur-~~  
~~ther alleged that by reason of such failure the~~ <sup>defendant</sup>  
~~appellant, not only became liable to pay the said~~ <sup>liable to pay</sup>  
~~amount of \$250.00 but also his reasonable damages~~  
~~for the loss of the use of said house moving tools,~~ <sup>the</sup>  
~~with the necessary purchase of other tools as well~~  
~~as the loss and damage to appellee for diversi-~~ <sup>plaintiff</sup>  
~~gains and profits which appellee would have made~~ <sup>plaintiff</sup>  
~~by the use of such tools, in his said business of~~  
~~moving houses. And where damages to the amount of~~ <sup>Plaintiff averred</sup>  
~~\$750.00. Appellant filed a plea of not guilty and~~ <sup>defendant</sup>  
~~a special plea averring that the appellee moved~~ <sup>plaintiff</sup>  
~~the said houses so unskillfully and negligently~~  
~~that one of the houses was damaged and injured~~  
~~to the amount of one hundred dollars; and further~~  
~~averred that appellee agreed as part of the contract~~ <sup>plaintiff</sup>  
~~to perform certain labor in the excavation of a~~  
~~basement which appellee failed to do;~~ <sup>plaintiff</sup>  
~~whereby appellant was damaged the sum of \$15.00.~~ <sup>plaintiff</sup>

\* It appears from the evidence intro-  
~~duced on behalf of the appellee, that appellant~~ <sup>plaintiff's evidence</sup> ~~defendant~~

removed and placed in storage. ~~that parties~~  
compliance with said agreement to remove the same  
houses within a reasonable time and according to  
the terms of the agreement. It was found that  
not comply with his promise and did not place the  
foundation under the house at this time, as  
agreed upon, and that plaintiff could not remove  
his house moving to the residence of the defendant  
July 27, 1914. The defendant failed to remove  
to pay the amount of \$100.00. The defendant later  
their alleged that he feared of such damage the  
applicant not only secured a new house but  
amount of \$250.00 for the use of said house and  
for the loss of the use of said house and  
with the necessary purchase of other tools and  
as the house was damaged by the defendant's house  
gains and profits which applicant would have made  
by the use of such tools. The defendant's  
to the houses. The defendant's house is the house of  
\$750.00. Applicant filed a bill in the court and  
a special plea averring that the defendant removed  
the said house a unskillful and negligent manner  
that one of the houses was damaged and destroyed  
to the amount of one hundred dollars; and further  
averred that applicant's real estate in the district  
to perform certain labor in the execution of a  
contract which applicant was bound to do;  
whereby applicant was damaged the sum of \$1,250.  
It appears from the evidence that  
based on the fact of the applicant's negligence

and ~~appellee~~ <sup>Plaintiff</sup> entered into an oral contract to move two frame houses owned by ~~appellee~~ <sup>defendant</sup>, one of which was to be moved back from its then location, upon the same lot, for a distance of about eighty feet, and the other house was to be moved from its location the distance of about one block and a half. ~~That appellee~~ <sup>Plaintiff</sup> agreed to move the houses as they then stood for the sum of \$250.00. It also appeared that it was desirable that a ~~certain~~ room be taken off of the large house to facilitate ~~the~~ moving thereof, and ~~that~~ <sup>it was agreed</sup> if ~~appellee~~ <sup>defendant</sup> would himself detach the said room ~~that appellee~~ <sup>Plaintiff</sup> would move the said buildings for \$200.00; but ~~that~~ <sup>Plaintiff</sup> if ~~appellee~~ <sup>Plaintiff</sup> had to detach ~~it~~ and remove it, or move the building with the room attached ~~that~~ the price would be \$250.00. ~~Also~~ <sup>Plaintiff</sup> that ~~it~~ was stipulated that ~~appellee~~ <sup>Plaintiff</sup> would not be liable for any damage to the building, and that under the ~~terms~~ <sup>agreement</sup> of the contract, ~~appellee~~ <sup>Plaintiff</sup> was to build a foundation under the large house within ten days from the time ~~appellee~~ <sup>Plaintiff</sup> had placed it in position so that ~~appellee~~ <sup>Plaintiff</sup> could remove his house moving tools from under the building. ~~That~~ <sup>Plaintiff</sup> the houses were moved and the latter of the two houses placed in position on May 29, 1914. ~~That~~ <sup>Plaintiff</sup> repeated demands were made by ~~appellee~~ <sup>Plaintiff</sup> and his son for their ~~tools~~ <sup>the</sup> but they were ~~not able to obtain them~~ until about the 27th of July following. It further appears ~~from the testimony of appellee and his witnesses~~ <sup>Plaintiff</sup> that at that time ~~he~~ <sup>Plaintiff</sup> had a contract with

about the 27th of July following. At that time  
demands were made by appellees and the appellees  
placed in position on May 29, 1914. First houses  
houses were moved and the latter part of the houses  
moving tools from under the buildings. Not the  
position so that appellees could remove the houses  
ten days from the time appellees had placed in  
build a foundation under the large houses within  
under the terms of the contract an effort was to  
be liable for any damage to the building, and that  
that it was stipulated that appellees would be  
attached the price would be \$200.00. The  
remove it, or move the building with the room  
\$200.00; but that if appellees failed to detach and  
that appellees would move the building with the  
it appellees would remove the building with the  
house to facilitate the moving process, and that  
that a certain room be taken off of the large  
\$250.00. It also appeared that it was desirable  
the houses as they then stood for the use of  
look and a half. That appellees agreed to move  
moved from its location the distance of about one  
about eighty feet, and the other houses were to be  
location. Upon the same day, the appellees moved  
one of which was moved back to its original  
to move two frames located under the building  
and appellees then moved the building to its new



<sup>one</sup> a man by the name of Davis to move <sup>a</sup> ~~another~~ house for ~~consideration of~~ five hundred dollars and that because of <sup>appellant's</sup> ~~appellant's~~ failure to ~~erect the~~ <sup>the</sup> foundation and release him <sup>plaintiff</sup> ~~moving tools~~ <sup>had to</sup> procure the assistance of another house mover, with his tools, to aid in the moving of the Davis house, and ~~claims~~ that by reason of ~~having to~~ <sup>the</sup> employ this assistance in the moving of the Davis house he lost profits to the amount of \$125.00, or more.

<sup>Expendant</sup> ~~The evidence introduced under the~~ <sup>plaintiff</sup> ~~test of the appellant tended to prove that appellee~~ <sup>plaintiff</sup> agreed to move the houses for \$200.00 if the room was detached but if not detached he was to have \$250.00 for moving it. <sup>Plaintiff</sup> ~~That appellee~~ agreed to detach the room or ell himself if permitted so to do, and move the house for \$200.00. <sup>Expendant</sup> ~~Appellant~~ denied ~~that he agreed to~~ place a foundation under the second house moved ~~as complained by~~ <sup>the</sup> ~~appellee~~, and denied ~~that it was stipulated in the contract~~ <sup>plaintiff</sup> that ~~appellee~~ was to be exempt from liability for damages caused by the moving of the houses but <sup>plaintiff</sup> ~~said~~ that ~~appellee~~ agreed to move the houses without damage and leave them in as good condition as he found them. <sup>Expendant</sup> ~~The evidence of appellee tends to~~ prove that the houses were damaged; the plastering cracked, chimney injured, and that one of the houses was otherwise twisted and damaged to the amount of \$75.00. It also appears that <sup>plaintiff</sup> ~~appellee~~ agreed to assist in digging the basement under the house

- 4 -



as part of the consideration ~~and arrangements~~  
under this agreement, which he failed to do;  
and further tends to show that ~~appellant~~ <sup>defendant</sup> incurred  
additional expense amounting to about \$17.00  
in procuring materials to remedy the injury  
caused by ~~appellee~~ <sup>plaintiff</sup> failure to properly care for  
and support the houses in the removal, ~~thereof~~. \*

The evidence in this case is very conflicting and if the account of this transaction as given by the appellee and his witnesses is to be believed then there is no question but what the defendant is liable to appellee for \$250.00 for the moving of these houses. Upon the other hand, if the testimony of appellant and his witnesses is to be relied upon then there is no question but what the appellee agreed to remove the houses for two hundred dollars and to place them in as good condition as they were then in. These, however, are questions of fact which it was proper for the jury to determine, and if nothing more than this contradiction of testimony had arisen upon the trial of the case there would be no difficulty in affirming the judgment upon the finding of the jury.

Counsel for appellant insist that the court erred in admitting evidence as to the measure of damages to which appellee was entitled on account of the breach of the contract, and in refusing to give an instruction advising the jury that any loss of profits under the Davis contract could not be

as part of the consideration and payment

under this agreement, and as the result of the  
and further to the fact that the defendant

additional evidence is required to show that

in procuring the goods, the defendant  
caused by himself to turn to the plaintiff

and support the burden in the contract  
The evidence in this case is very

fluctuating and if the account of this transaction  
as given by the appellee and the witnesses is to

be believed then there is no question but that the  
defendant is liable to reimburse the plaintiff

the moving of these boxes. When the boxes were  
it the testimony of the plaintiff and the witnesses

is to be relied upon then there is no question  
but what the appellee agreed to reimburse the plaintiff

for two hundred dollars and to place them in  
Good condition as they were when they were

ever, are questions of fact which it was the duty of  
for the jury to determine, and it is not the duty of

this court to determine questions of fact which  
trial of the case there would be no difficulty in

affixing the judgment upon the evidence in the case.  
Counsel for defendant submit that

court erred in admitting evidence as to the amount  
of damages to which appellee was entitled or entitled

of the breach of the contract, and in refusing to  
Give an instruction advising the jury that the

of profits under the contract could not be

considered in estimating appellee's damages. There are the questions to which counsel for appellant and appellee have devoted the greater part of their argument.

It appears from the evidence that at the time that appellee entered into this contract with appellant, he had a contract with one Davis for the removal of another house for which he was to receive a consideration of five hundred dollars, and that because the tools of appellee were kept under appellant's houses longer than agreed upon that appellee was compelled to employ another house mover to assist him in the moving of the Davis house, and he thereby lost profits to the amount of \$125.00 or \$126.00. The introduction of this testimony was objected to by counsel for appellant, objection overruled and exceptions preserved. We believe that the court erred in permitting this testimony to be introduced as the measure of damages which appellee was entitled to receive. It was going into a field of speculation and profit when he should have been confined in the measure of damages to the value of those of the tools during the time which he was deprived of them by appellant withholding them, especially so in view of a statement made by appellee in his testimony wherein he says, "I should have had my jacks in ten days. He was to pay me for the use of these tools if he didn't have them out". While it appears from the testimony that appellee had this contract

considered in estimating appellant's damages.  
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by appellant withholding them, especially so in view  
of a statement made by appellee in his last story  
wherein he says, "I should have had my tools in  
ten days. He was to pay me for the use of these  
tools if he didn't have them out." While it appears  
from the testimony that appellee was in a contract

with Davis at the time of making his agreement with appellant, yet it does not appear that he advised appellant of having any such a contract on hand or having any special reason for getting his jacks and tools out from under the house within ten days. It seems to us that from this testimony that appellee did not at that time have in mind anything but the use of his tools and did not contemplate charging profits ~~xxx~~ that he might lose upon the Davis job to appellant, but even if he did he kept it to himself and under repeated decisions of our Court prospective profits are too remote to form the measure of damages occasioned by the breach of contracts. In permitting profits to enter into and form the basis of damages for the breach of contract it was said, "The method much more likely to mislead could well be devised. Such estimate is purely conjectural. A thousand things might have prevented the realization of the profits sanguine witnesses estimate could have seen. Customers may fail to pay; rivalry may cause a decline in price; accidents may suspend business; injuries to employees or strangers may cause loss; dishonesty may sweep away funds. The real reason why estimates of profits that could have been made is not the proper criterion for ascertaining damages in such a case, is because such is not the method pointed out by the law. Calculations as to prospective profits in other enterprises which a party would have engaged in, had his contract with a



with Davis at the time of making his statement  
with approval, but it is not known that he  
advised approval of Davis' any such statement  
on hand involving any special reason or action  
his Jacks and took out from under the hand  
within ten days. It seems to me that from the  
testimony that appellee did not at that time have  
in mind anything but the use of his tools and his  
not contemptible or contemptible profits was not  
upon the Davis to the appellee, but even if he  
did he kept it to himself and never revealed the  
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injuries to employees or strangers may cause loss;  
dishonesty may sweep away everything. The real reason  
why estimates of profits that could have been made  
is not the proper criterion for the award of damages  
seen in such a case, is because such a method  
method pointed out by the law. Certain losses are  
prospective profits in other circumstances, and  
party could have engaged in, and his contract with



defendant been fulfilled, are altogether too remote to form the basis of damages occasioned by the breach of such contracts." Consumers' Pure Ice Co., Vs. Jenkins, 58 App., 523; and authorities there cited.

The serious question, however, to be considered in this case is, was the appellant injured by the admission of this testimony, and the refusal of this instruction? <sup>plaintiff</sup> It appears from the testimony of the ~~appellee~~ <sup>plaintiff</sup> that some time in the month of July he had a conversation with ~~appellee~~ <sup>appellee</sup> appellant in which he ~~says~~ <sup>admitted</sup> appellant offered to pay him two hundred dollars, by check, for that amount. This ~~however~~ <sup>defendant testified</sup> is denied by the appellant but the ~~appellee~~ <sup>defendant</sup> does state that in this conversation, "He claimed that I owed him \$250.00. I claimed that I owed him \$200.00. This declaration was made prior to the commencement of the suit and before either of them had figured upon any extras that they might demand of each other, <sup>+</sup> and it seems to us that it is a clear admission upon the part of appellant that he owed the appellee two hundred dollars and if this be true then the verdict is not unjust, for it is for the exact amount of two hundred dollars. Even though there may have been error in the admission of testimony and the instructions, yet if such error has not caused injustice to the appellant then this court has no right to disturb the judgment of the lower court. It is sought by counsel for appellant to avoid the force of this

defendant been killed, the defendant two  
remote to form the basis of a charge  
by the breach of such contract. "Consequently"  
Pure Ice Co., vs. Lawrence, 50 App. 323; and no-  
twithstanding these cases.

The second question, however, is the  
considered in this case is, was the appellant in-  
jured by the admission of this testimony, and  
the refusal of this instruction? It appears from  
the testimony of the witnesses that some time in  
the month of July he had a conversation with the  
and in which he says appellant offered to pay him  
two hundred dollars, by check, for this amount.  
This, however, is denied by the appellant and the  
evidence does not in this connection.  
"He claimed that I owed him \$200.00. I claimed  
that I owed him \$200.00. This declaration was made  
prior to the commencement of the suit and before  
either of them had figured upon any extra that  
they might demand of each other, and it seems to me  
that it is a clear admission upon the part of  
appellant that he owed the appellee two hundred  
dollars and it is to be true that the verdict is not  
unjust, for it is for the exact amount of the ad-  
judged dollars. Even though there may have been error  
in the admission of testimony and the instruction,  
yet if such error has not caused injustice to the  
appellant then this court has no right to disturb  
the judgment of the lower court. It is hereby  
counsel for appellant to avoid the error of law.

admission by saying that it was a statement made in an effort to compromise and therefore not admissible in evidence. We do not think so. The conditions under which this statement was made were that appellee went to appellant's place of business for a settlement. Appellee stated what he claimed that appellant owed him and appellant stated what he claimed that he owed appellee. The differences between them was not sought in any manner to be adjusted or no effort made by either party to compromise or adjust the same. We think it is clearly an admission of an independent fact, and even though the admission may have been made in an effort to settle their differences, or compromise, that would not prevent it from being competent to show such an admission. There is no intimation in the statement that it was made by the way of compromise and in confidence or without prejudice.

"It is well settled that an offer by way of compromise is not admissible in evidence against the party making it but admissions of independent facts made in the course of admissions to settle are admissible, unless expressly stated as made without prejudice or in confidence. Greenleaf on Evidence, Sec. 192; Wharton on Evidence Sec. 1090; Sanborn Vs. Veilson, 5 N. H. 501; Harrington Vs. Inhabitants of Lincoln, 4 Gray, 563-566". Reine Vs. The People, 37 App., 589. And the same doctrine is announced in Thom V. Hess, 51 Ill., app., 274; Kuhn Vs. Williams, 124 Ill., App. 390.

? *by intimation*

admission by saying that it was a statement made  
 in an effort to compromise and to settle the  
 admission in evidence. The conditions under which the  
 were that applied to the settlement of the  
 business for a settlement. The settlement was made in  
 claimed that settlement was made in evidence. The  
 stated what he claimed that he had settled. The  
 differences between them was not settled. The  
 ner to be adjusted or no effort was made by the  
 party to compromise or adjust the same. The  
 it is clearly on admission of the settlement. The  
 and even though the admission may have been made in  
 an effort to settle their differences, in a compromise,  
 mise, that would not prevent it from being evidence  
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 there is not admissible in evidence what the  
 party making it but admission of independent  
 facts made in the course of admission to settle  
 inadmissible, unless expressly stated as such  
 without prejudice or in confidence. The settlement on  
 evidence, see, 102; Grant on Evidence, 10, 102;  
 Pearson vs. Pearson, 5 N. 301; 301; 301; 301;  
 Inhabitants of Lincoln, 4 Cr. 303-304; 303-304;  
 The People, 37 N. 303. The settlement was  
 is announced in The People, 37 N. 303; 303;  
 Kuhn vs. Williams, 104 Ill. 303.

It appears to us from this record that nothing is to be gained by the granting of a new trial and that it is unjust to require appellee to incur the expense of another trial, where it is disclosed by the record, as in this case, that appellant himself claimed that the amount he owed appellee was \$200.00.

Other errors have been assigned and argued by counsel for appellant in this case but the errors are without merit and far less important than the error above considered and we cannot see that such errors could in any manner have influenced the obtaining of the judgment, at least that appellant was not unduly prejudiced in his rights by reason thereof. Where substantial justice has been done the Appellate Court will not disturb the verdict merely because of errors committed upon the trial of the case. Beifield vs. Lease et al., 101 Ill., App., 539; Burling Admx., etc., vs. I. C. N. H. Co., 85 Ill., 18.

We are of the opinion that the verdict and judgment in this case should not be disturbed for the reasons above set forth, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.



It appears to me from this record that nothing is to be gained by the granting of a new trial and that it is unjust to require appellee to incur the expense of another trial, where it is disclosed by the record, as in this case, that appellee himself claimed that the amount he owed appellee was \$200.00.

Other errors have been assigned and argued by counsel for appellant in this case but the errors are without merit and far less important than the error above considered and we cannot see that such errors could in any manner have influenced the reasoning of the judgment, at least that appellant was not unduly prejudiced in his rights by reason thereof. Where substantial justice has been done the Appellate Court will not disturb the verdict merely because of errors committed upon the trial of the case. *Welfield vs. Reese et al.*, 101 Ill. App. 329; *Waring Adams, etc., vs. I. C. & N. Co.*, 85 Ill. 18. The opinion that the verdict and judgment in this case should not be disturbed for the reasons above set forth, and the judgment of the lower court be affirmed.

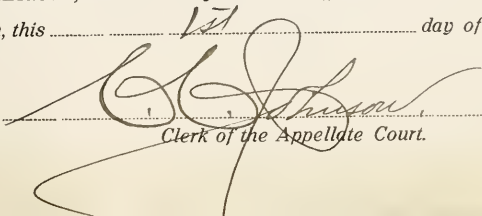
JUDGMENT AFFIRMED.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 1st day of December,  
A. D. 1915.

  
Clerk of the Appellate Court.

PINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 12<sup>th</sup> day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 243

ERROR TO  
APPEAL FROM

vs.

No. 50

March Term, 1915

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. Carl E. Sheldon



Term No. 50.

Agenda No. 65.

In the Appellate Court.

Fourth District.

March Term, A. D. 1915.

Fred Kleet,

Appellee.

Vs.

Southern Illinois Coal  
& Coke Company,

Appellant.

Appeal from Williamson

County Circuit Court.

McBride, J.

It is sought by this appeal to reverse a judgment of five hundred dollars and costs, recovered by appellee in the Circuit Court of Williamson County. *H. appeared that Plaintiff had* ~~The appellee~~ *and* for several years been engaged in the business of driving a mule in coal mines and had been at work for the ~~appellee~~ *appellee* as a driver for several months prior to his injury. On May 21, 1914, he was given a mule, ~~named George~~, to drive in what was known as the first west entry off the third south entry. He ~~made several trips with this mule, driving it from about eight o'clock in the morning until about four in the afternoon, at~~ *from the mule* *am* *which* *time* *he* *was* *injured.* *It appears from the evi-* *dence that* *this mule was ungovernable and had a habit of turning off of the regular line of pulling into*

In the Appellate Court.

North District.

Case No. 1000.

Appeal from Illinois  
County Circuit Court.

And Next,  
Appellee.  
vs.  
Southern Illinois Gas  
& Coke Company,  
Appellant.

Bridge, J.

It is sought by this appeal to reverse  
a judgment of five hundred dollars and costs, re-  
covered by appellee in the Circuit Court of Illinois  
County. The appellee and her several years' husband  
engaged in the business of driving a mule and  
mines and had been at work for the appellee as a  
driver for several months prior to his injury. On  
May 21, 1914, he was given a mule, named George, to  
drive in what was known as the first west entry of  
the third south entry. He made several trips with  
this mule, driving at first about eight o'clock in  
the morning until about four in the afternoon, at  
which time he was injured. It appears from the  
evidence that this mule was unmanageable and habit  
of turning off of the regular line of walking into



rooms whenever <sup>if</sup> he observed <sup>saw</sup> a light in the rooms  
or at least <sup>to</sup> frequently did <sup>so</sup> this. The <sup>plaintiff</sup> appellee, ~~he~~  
~~know~~ knew nothing about this mule and ~~knew nothing~~ <sup>of</sup>  
of such habits, and that ~~that~~ <sup>that</sup> was the first day he  
had driven it. It appears that <sup>when</sup> the mule attempt-  
ed to leave the ~~regular entry track~~ <sup>desired</sup> that it frequent-  
ly caused the car to be thrown from the track, and  
~~the~~ drivers were unable to restrain <sup>him</sup> the mule by  
the use of lines, <sup>claiming</sup> as they claim the mule would  
catch the bit between <sup>in</sup> his teeth so that the lines  
would ~~have no effect upon checking or guiding him,~~  
and it is ~~claimed~~ <sup>not</sup> when he would turn off this would  
~~throw the car off the track and that it was dangerous~~  
~~to the driver.~~ <sup>detail</sup> That during the day <sup>plaintiff</sup> appellee drove  
the mule he had turned out ~~some~~ <sup>several</sup> two or three times  
and ~~thrown~~ <sup>derailed</sup> the car off of the track, and that the  
last time ~~before appellee was hurt~~ <sup>plaintiff was hurt</sup> was about twenty  
or thirty minutes, or possibly longer, <sup>at this</sup>  
~~time~~ <sup>then</sup> Mr. Dickson, ~~the~~ assistant mine manager, was  
present, and it is <sup>undisputed</sup> ~~claimed~~, and not denied, that  
<sup>plaintiff</sup> appellee said to him "Joe, this mule ought to be  
taken off of this run, if he aint he is going to  
kill or hurt some driver." It appears that ~~after~~  
the <sup>plaintiff</sup> appellee had described <sup>actions of</sup> to the ~~assistant mine~~ <sup>Dickson</sup>  
~~manager the manner in which the mule had been per-~~  
~~forming,~~ <sup>known</sup> ~~that the mine manager then said that he~~  
would stand at the room and keep the mule from turn-  
ing into it. <sup>Plaintiff</sup> That appellee said to him that he  
ought not do that as it would cause the mule to  
hurt him. After making three or four trips more

rooms whenever he observed a light in the rooms  
at first frequently did this, he was  
knew nothing of this rule and knew nothing  
of such habits, and that was the first day he  
had driven it. It appears that when the mule attempt-  
ed to leave the regular track it immedi-  
ately caused the car to be thrown from the track, and  
the drivers were unable to re-train the mule by  
the use of lines, as they claim the mule would  
catch the bit between its teeth so that the line  
would have no effect upon checking or guiding it,  
and it is claimed when he would turn off this would  
throw the car off the track and that it was dangerous  
to the driver. During the day apples drove  
the mule he had turned out some two or three times  
and thrown the car off of the track, and that the  
last time before apples was hurt was about twenty  
or thirty minutes, or possibly longer, at this  
time Mr. Dickson, the assistant mine manager, was  
present, and it is claimed and not denied, that  
apples said to him "Joe, this mule ought to be  
taken off of this run, if he ain't he is going to  
kill or hurt some driver." It appears that after  
the apples had described to the assistant mine  
manager the manner in which the mule had been run-  
ning, the mine manager then said that he  
would stand at the room and keep the mule from turn-  
ing into it. The apples said to him that he  
ought not do that as it would cause the mule to  
hurt him. After making rates of four trips more

*Late*

the mule again attempted to turn into a room and  
~~the manager~~ Dickson, undertook to keep him out,  
and as ~~appellee~~ *plaintiff's claim* Dickson came towards the

mule with a stick when he turned in, but the mule  
turned out and ~~this~~ *plaintiff* slackened the tail chain and  
pushed ~~him~~ *plaintiff* off of the car, and that he fell, and in  
grabbed at the spreader strap, he missed it and  
swung under the car and ~~the car~~ *he* ran upon him and  
broke three ribs and otherwise injured ~~appellee~~ *him*.

Dickson, ~~the assistant mine manager~~, denied that he  
stood in the room and frightened or struck the mule,  
~~as claimed~~, or that the mule by reason of such  
fright turned and knocked ~~appellee~~ *plaintiff* under the car.  
He claims that ~~appellee~~ *plaintiff* was looking back to see the  
driver following him and fell off of the tail chain  
and was hurt.

It further appeared from the evidence in  
this case that at the time of and prior to the day  
of the injury the ~~appellee~~ *defendant* had elected not to  
operate its mine under the compensation act. ~~10~~ *1*

\* The first count of the declaration charged  
that it was the duty of the defendant to exercise  
ordinary care to provide plaintiff with a reasonably  
safe mule to drive, and that the defendant negligently  
provided him with an unruly, ungovernable and  
dangerous mule, in this, ~~said mule~~ *that the* could not be safely  
handled by the driver on account of his ~~unruly and~~  
~~ungovernable~~ disposition, and was likely to injure  
plaintiff by suddenly turning into rooms or cross-  
cuts along said entry; that the defendant knew or  
by the exercise of ordinary care for plaintiff's



the mule again attempted to turn into a room and  
the manager Dickson undertook to keep him out,  
and as Appleby came towards the mule with a stick when he turned in but the mule  
turned out and this slackened the tail chain and  
guaranteed off of the car and the mule fell, and in  
grabbing at the spreader grip he passed it and  
swung under the car and the car ran upon him and  
broke three ribs and otherwise injured Appleby.  
Dickson, the assistant mine manager, denied that he  
stood in the room and frightened or struck the mule,  
as claimed, or that the mule by reason of such  
fright turned and knocked Appleby under the car.  
He claims that Appleby was looking back to see the  
driver following him and fell off of the tail of the  
car and was hurt.

If further consideration the evidence in  
this case that at the time of and prior to the day  
of the injury the appellant had elected not to  
operate its mine under the competition act.

The first count of the declaration charges  
that it was the duty of the defendant to exercise  
ordinary care to provide plaintiff with a reasonably  
safe mule to drive, and that the defendant negligent-  
ly provided him with an unruly, unmanageable and  
dangerous mule, in this, said mule could not be safely  
handled by the driver on account of his unruly and  
unmanageable disposition, and was likely to injure  
plaintiff by suddenly turning into rooms or cross-  
cuts along said entry; that the defendant knew or  
by the exercise of ordinary care for plaintiff's

safety could have known of the ~~unruly and dangerous~~  
disposition of ~~said~~ <sup>the</sup> mule, and would also have known  
of the danger to plaintiff of driving said mule by  
reason thereof. That ~~appellant~~ <sup>defendant</sup> prior to the 28th  
day of May had elected not to provide and pay com-  
pensation under the compensation act, which is set  
forth in substance in the declaration; and had  
prior to said date filed notice of such election  
with the Industrial Board of the State of Illinois,  
and had not on said date withdrawn said notice. And  
*defendant* then alleges in consequence of such election that  
~~he~~ <sup>it</sup> was deprived of the defenses specified in the  
statute.

The second count of the declaration  
alleged the same conditions as the first, ~~count~~,  
and the same disposition of the mule, and then charged  
that the foreman of the defendant approached ~~said~~ <sup>the</sup>  
mule with a large stick in his hand and began beating  
and striking ~~said~~ <sup>the</sup> mule over the head with the stick  
and in consequence of the ~~said unruly and ungovern-~~  
~~able~~ disposition of ~~said~~ <sup>the</sup> mule, combined with the  
assault made on him by the foreman, said mule jammed  
plaintiff between the car and said mule, thereby  
breaking three ribs, etc.

The first additional count charged the  
furnishing of the same character of mule as set forth  
in the former counts, and then alleged that while  
plaintiff was driving ~~said~~ <sup>the</sup> mule the foreman negligently  
stepped from one of said rooms and with a large stick  
in his hands frightened ~~said~~ <sup>the</sup> mule, and on account of

safety could have been as the matter was not  
disposition of any wife, and would have been  
of the danger to the safety of the wife  
reason thereof. That the effort prior to the  
day of the day had elected of to provide and pay  
generation under the operation act, which is  
form in substance in the declaration; and that  
prior to said date like notice was given  
with the Industrial Union of the State of Illinois,  
and had not on said date withdrawn said notice. And  
then alleges in consequence of such election that  
it was derived of the defendant as set forth in the  
statute.

The second count of the declaration  
alleges the same conditions as the first, except  
and the same disposition of the wife, and then alleges  
that the foreman of the defendant approached said  
wife with a large stick in his hand and began to strike  
and striking said wife over the head with the stick  
and in consequence of the said striking and beating  
said disposition of said wife, confined in the  
assault made on him by the foreman, said wife  
plaintiff between the car and said wife, thereby  
breaking three ribs, etc.

The first additional count charges the  
furnishing of the same character of cause as the first  
in the former count, and then alleges that while  
plaintiff was driving said wife the foreman held in his  
stepped from one of said rocks and with a large stick  
in his hands threatened said wife, and on account of



*its disposition*  
~~the scary and dangerous condition~~ that plaintiff  
was unable to control the ~~said~~ mule and that his  
disposition, combined with the frightening by the  
foreman, caused the plaintiff to fall from his  
position on ~~said~~ <sup>the</sup> car, and he was thereby injured.

*this* ~~said~~ <sup>this</sup> count also makes substantially the same allegation  
as the other counts as to the defendant having  
elected not to operate under the compensation act. \*

The first error assigned is upon the refusal of the court to give to the appellant a peremptory instruction because neither count of the declaration stated by proper allegation facts from which it would legally follow that appellant had rejected the compensation act of 1913. As stated by appellant, the count then sets forth certain provisions of the compensation act of this state (being the act in substance) and then avers that on the date aforesaid appellant was an employer of labor and servants under said act; that prior to the 26th day of May 1914, it had elected not to provide and pay compensation provided in said act, etc. The point made is, that it was necessary in the declaration to allege two things; 1st. That the appellant filed the notice, electing not to come under the compensation act, with the Industrial Board. 2nd. To post a copy of this notice at the mine, as required by statute. The latter clause is not charged to have been done in the declaration but it is charged in general terms that the defendant elected not to cooperate its mine under the compensation act; which as we believe, is the ultimate fact, and sufficient after verdict with-

the court in its decision that the defendant was unable to control the work and that the disposition, combined with the testimony of the foreman, caused the plaintiff to fall from his position on said car, and he was thereby injured. The court also stated that the defendant was not elected not to operate under the compensation act. The first error assigned is that the reversal of the court to give to the appellant a contrary instruction because neither count of the declaration stated by proper allegations facts from which it would legally follow that appellant was rejected the compensation act of 1913. As stated by appellant the court then sets forth certain provisions of the compensation act of this state (being the act in substance) and then says that on the date aforesaid appellant was an employer of labor and services under said act; that prior to the said day of July 1914, it had elected not to provide and pay compensation provided in said act, etc. The point made is that it was necessary in the declaration to allege two things; first, that the appellant filed the notice, electing not to come under the compensation act, with the Industrial Board. That is what a copy of this notice at the time, as required by statute. The latter clause is not charged to have been done in the declaration and it is charged in general terms that the defendant elected not to operate the mine under the compensation act; which as we believe, is the ultimate fact, and sufficient to set aside the

out making any other averment. It may be that if a demurrer had been interposed to the declaration and this question raised, that the court would have required the declaration to have been made more specific. The ultimate fact required to be proven was that appellant elected not to operate its mine under the compensation act, and as we understand the rule of pleading, all that is necessary to make a good declaration, at least after verdict, is to allege the ultimate fact to be proven. "For the purpose of pleading, the ultimate fact to be proven need only to be stated. The circumstances which tend to prove the ultimate fact can be used for purposes of evidence but they have no place in the pleadings." *Davis Vs. Wis. Cent. R. R. Co.*, 54 App., 636. It has been decided by this court that, "It is a rule of law well understood that it is unnecessary to plead the evidence, as ultimate facts only need to be averred in good pleading." *Alton Ry. & Illuminating Co. Vs. Foulds*, 81 App., 332. This doctrine is fully sustained in the case of *Chicago City R. R. Vs. Jennings*, 157 Ill., 274. It is true the declaration did allege the filing of the notice with the Industrial Board but failed to allege the posting thereof, but, as we have seen, this was a simply evidence or the manner of proving the general fact and that it was not a necessary averment, but if it were, under the rules of pleading it would have to be regarded as an averment improperly or incompletely made, and it has been determined by

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 if it were, under the rules of pleading, it would  
 have to be regarded as an averment immaterially or  
 incompletely made, and it has been determined by



our Supreme Court that a defective statement of a good cause of action is corrected by verdict. Many, if not all of the cases cited by appellant in support of its position arose upon demurrer to the declaration, or under the city and village act where the statute required as a condition precedent to the bringing of the suit that a notice be given to the city of the date, hour and place where the injury was inflicted; and it is but reasonable to suppose that if in these cases the declaration had averred in general terms that notice of the time and place, as provided by statute, had been given, and the proof offered had shown that the notice contained the necessary requirements, that at least after verdict this would have been sufficient. Indeed the Supreme Court, in commenting upon a declaration which failed to allege notice, in the case of Walters Vs. The City of Ottawa, 240 Ill., 259, in reference to a verdict by verdict, in quoting from Chitty says, "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by verdict.-----

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After verdict it may be intended that every essential fact alleged in the declaration, or fairly to be implied from what is alleged, was established on the trial; but where the declaration fails to show that the plaintiff has a cause of action there is no room for intendment or presumption.----- There is no allegation in either of the original counts having even remote reference to the notice; nothing from which the giving of notice can be implied. It could not therefore, if a verdict had been rendered on those counts, be presumed to have been proved and the declaration would not have been sufficient to support a judgment." In the case at bar, however, the declaration does aver in general terms the election not to operate under the compensation act, and the proof shows that the acts necessary to constitute this allegation were performed. We are of the opinion that the declaration, after verdict, was good and that the point made is not well taken.

It is insisted that the proof offered of the notice filed with the Industrial Board and posting at the mine, was not competent to prove these facts. Proof of the filing of a notice with the Industrial Board was shown by certified copy from the Secretary and under the seal of the Board, which we have in proceedings heretofore held to be sufficient; that of the notice posted was shown by statement of witnesses who read the notice, and of one who copied the notice and said it was a true copy to the best of his knowledge. This was only a description of a notice posted and we understand the rule of evidence to

After verdict it may be stated that the  
fact alleged in the indictment, or that it  
was a fact at the time, was not in issue  
the trial; but where the fact is in issue  
that the defendant was a cause of action there is  
no room for judgment or discretion.  
There is no allegation in either of the original  
counts having even remote reference to the notice;  
nothing from which the giving of notice could be implied.  
It could not therefore, at a verdict not based thereon,  
be on those counts, be returned as a matter of course,  
and the declaration would not have been sustained  
to support a judgment. In the case at hand, however,  
the declaration does aver in general terms the  
election not to operate under the compensation act,  
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trial Board was shown by certified copy from the Sec-  
retary and under the seal of the Board, which was  
having proceedings heretofore held to be sufficient;  
that of the notice posted was shown by statement of  
witnesses who read the notice, and of one who copied  
the notice and said it was a true copy to the best  
of his knowledge. This was only a description of  
notice posted and we understand the rule of evidence to

be that where you are undertaking to show an inscription upon a wall or of a notice posted, that the contents of it may be given by those who have read the notice. We do not think that the court erred in the admissibility of this testimony.

The next complaint is, that the court erred in refusing to give to the jury appellant's third refused instruction. The point made in this instruction is that the second count alleged that the foreman struck the mule and that as there was no evidence of the foreman having struck the mule there could be no recovery under that count. We are, however, unable to see how the defendant's rights could be prejudiced by the refusal to give this instruction. The effect of it would have been to have taken the consideration of that count of the declaration from the jury, but if there was no evidence to support that count the presumption would be that the verdict was rendered upon the other counts, and even though failure to give this instruction might have been error, it could not be reversible error. If one good count is sustained by the evidence this is sufficient. *Eldorado Coal & Coke Co. vs. Swan*, 227 Ill., 586. Even though the defendant be found guilty upon an insufficient count, also upon a sufficient count, the fact that the court has given an instruction authorizing a recovery upon such insufficient count, will not reverse. *Peebles vs. O'Gara Coal Co.*, 143 App., 370. This is not such error as would work a reversal of this case.

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scription upon a wall or of a notice posted, that  
the contents of it may be given by those who  
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erred in the admissibility of this testimony.  
The next complaint is, that the court  
erred in refusing to give to the jury instructions  
third refused instruction. The ground stated in this  
instruction is that the second count alleged that  
the foreman struck the wife and that as there was  
no evidence of the foreman having struck the wife  
there could be no recovery under that count.  
are, however, unable to see how the defendant's  
rights could be prejudiced by the refusal to give  
this instruction. The effect of it would have been  
to have taken the consideration of that count out  
of the declaration from the jury, and if there was no  
evidence to support that count the presumption  
would be that the verdict was rendered upon the  
other counts, and even though failure to give this  
instruction might have been error, it could not be  
reversible error. If one count is insufficient  
by the evidence this is sufficient. *People v. [illegible]*  
*1886*. *People v. [illegible]*, 227 Ill. 286. When the  
defendant be found guilty upon an insufficient  
count, also upon a sufficient count, the fact that  
the court has given an instruction in substance as  
a recovery upon such insufficient count, and that  
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370. This is not such error as would require  
reversal of this case.



Complaint is also made of failure of the court to define "proximate cause", "accident", because it is claimed that these words are technical and should be explained. We do not regard the failure to explain such words as necessarily erroneous.

Criticism is also made upon appellee's instruction No. 2. This we think is without merit as the instruction was simply with reference to the knowledge and did not direct a verdict, and it did appear from the evidence that the boss driver, Roberts, had received notice of this automobile's disposition during the month of February before.

Criticism is made upon appellant's instruction No. 3, because it advised the jury as to the defense that appellant was deprived of, if it had elected not to operate under the compensation act. Also that it left the jury to determine without an instruction what evidence was necessary and whether or not such an election had been made. As to the former objection the plaintiff had a right to an instruction advising the jury as to the defenses that defendant was deprived of; and upon the other question, if appellant had desired an instruction defining what was necessary to be proven he should have asked for it, and having failed to do so we do not see how he can complain. And the same rule applies to appellant's objection to instruction No. .

Appellant's 14th instruction, as modified, could well have been given as presented, but we do not think the modification made the instruction erroneous. It only made it more specific but the



Complaint is now made of failure of

the court to follow the instructions, and

because it is of course true that the instructions

and should be applied, and so the court's failure

to explain such points is necessarily erroneous.

Criticisms are also made upon various

instructions. For example, in instruction No. 1,

as the instruction was slightly different from

knowledge and did not direct a verdict, and it is

appears from the evidence that the jury

hesitated, and received advice from the court.

tion during the course of the trial.

Criticisms are made upon various

instructions. For example, in instruction No. 1,

the defense that the jury was deprived of, it is

and elected not to operate under the presumption

act. Also that it left the jury to determine without

an instruction that evidence was necessary and was

there or not such an election had been made. As to

the former objection the defendant had a right to

an instruction advising the jury as to the defense

that defendant was deprived of; and upon the other

question, if appellant had desired an instruction

defining what was necessary, to be proven he should

have asked for it, and having failed to do so we do

not see how he can complain. And the same rule applies

to appellant's objection to instruction No. 1.

Appellant's fifth instruction, as modified,

could well have been given as presented, but we do

not think the modification made the instruction

erroneous. It only made it more specific and the

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same general principle was covered by the instruction without the specific modification.

The 13th modified instruction complained of was given upon the request of appellant substantially in appellant's sixth instruction, and we think they have no right to complain.

Other errors have been assigned upon the instructions and the introduction of evidence, objections as to testimony and declarations by counsel during examination of the witnesses, and the setting of the case for trial. We have examined them but regard them as unimportant, and to some of them as made, no exceptions have ever been preserved.

The next error assigned is, that the verdict is manifestly against the weight of the evidence. The evidence is very conflicting and difficult to determine with exactness. It is true, as contended by appellant, that the appellee states that the mule turned back into room No. 8, and suddenly stopped, and the car came forward and caught appellee, and that the mule was stopped by the acts and conduct of Dickson; this is all denied by Dickson; but it does appear, and is not disputed, that Dickson went into the room for the purpose of frightening the mule out or knocking him out if he attempted to run into the room with his load. ~~He~~ <sup>was</sup> ~~little~~ <sup>was</sup> ~~the~~ <sup>was</sup> ~~xxx~~ saw Dickson at the room with a stick in his hand <sup>Sawyer</sup> ~~who said~~ that he was going to knock ~~out~~ the mule <sup>out</sup>, J. H. Mooney <sup>said</sup> ~~said~~ that Dickson told him that he was going to turn the mule back. McDougal ~~said~~ <sup>said</sup> that he

and that I believe was covered by the investigation.

Without the effect of modification.

The light modified instruction was given.

It was given on the basis of the evidence presented.

It is apparent that the evidence was not sufficient.

have no right to complain.

Other errors have been pointed out.

Instructions and the introduction of evidence, and

testimony as to testimony and testimony.

concerned during the trial of the case, and

the setting of the case for trial. We have examined

them but regard them as unnecessary, and to some extent

them as such, no exceptions have been preserved.

The next error assigned is, that the ver-

diction is manifestly against the weight of the evidence.

The evidence is very conflicting and difficult to

determine with certainty. It is, however, conceded

by appellant, that the evidence tends to show that

turned into from the car, and was carried away.

and the car was found and carried away, and

that the mule was stopped by the mule and carried

to Jackson; this is all denied by appellant, and it

does not appear, and is not admitted, that the mule

into the room for the purpose of taking the mule

into the room with the mule, and it is admitted to the

into the room with the mule, and it is admitted to the

into the room with the mule, and it is admitted to the

into the room with the mule, and it is admitted to the

into the room with the mule, and it is admitted to the

into the room with the mule, and it is admitted to the

saw Dickson standing at room No. 7 or 8 with a stick in his hand from 18 inches to two feet long, and that Dickson told him, "he was going to knock the mule out" (1) It further appears from the testimony of Clarence Briggs, that he heard the conversation between appellee and Dickson, in which Dickson said, "I will stand here and keep the mule from turning out. Plaintiff said something but I didn't understand what it was." While the evidence offered is not very strong in corroboration, yet it does tend to sustain appellee's statement in the case, and does show that there was a disposition upon the part of Dickson to ~~wait~~ wait for the mule to attempt to turn into the room, and when it did so to scare him out or knock him out. It also appears by a preponderance of evidence that when Dickson told appellee he would frighten the mule out that appellee told him not to do that for fear he would get hurt. Dickson was the assistant mine manager and in charge of the men and if he did attempt to scare the mule and cause the mule to turn and slacken the tail chain upon which appellee was standing, and knocked appellee against the car, and caused him to fall under the car, as stated, then we believe the jury would be warranted in rendering a verdict against appellant. This was purely a question of fact to be determined by the jury. They saw and heard the witnesses testify and were judges of their credibility, and the court having overruled appellant's motion for a new trial we are



Ray Dickson standing at room no. 5 on the first floor, and that Dickson said to him, "I will stand here and see the mule out" (1) it further appears from the testimony of Clarence Y. Gage, that he heard the conversation between appellee and Dickson, in which Dickson said, "I will stand here and see the mule from turning out." Plaintiff said something but didn't understand what it was. While the evidence offered is not very strong in corroborating, yet it does tend to sustain appellee's statement in the case, and does show that there was a discussion upon the part of Dickson to wait until the mule attempt to turn into the room, and when it did so to scare him out or knock him out. It also appears by a preponderance of evidence that when Dickson told appellee he would frighten the mule out that appellee told him not to do that for fear he would get hurt. Dickson was the restaurant manager and in charge of the men and it was his attempt to scare the mule and cause the mule to turn and attack the tail chain upon which appellee was standing, and knocked appellee against the car, and caused him to fall under the car, as stated, then we believe the jury would be warranted in returning a verdict against appellant. This was merely a question of fact to be determined by the jury. They saw and heard the witnesses testify and were judges of their credibility, and the court having overruled appellant's motion for a new trial we are



not able to say that the verdict of the jury was manifestly against the weight of the evidence, and unless we can do so it becomes our duty to sustain the verdict and judgment.

There is no error in this record that requires a reversal of the judgment, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

not able to say that the verdict of the jury was manifestly against the weight of the evidence, and unless we can do so it becomes our duty to sustain the verdict and judgment.

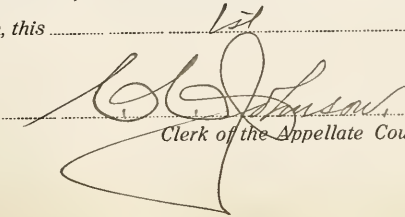
There is no error in this record that requires a reversal of the judgment, and the judgment of the lower court is affirmed.

JUDGE T. J. ANDERSON.

Not to be reprinted in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# PINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 259

XEROBLOX  
APPEAL FROM

Marie Hughes, Admrx.

Appellee.

vs.

No. 55

Circuit COURT

March Term, 1915

Saline COUNTY

Eldorado Coal & Mining Co.,

Appellant.

TRIAL JUDGE

HON. Wm. N. Butler.





In the Appellate Court,  
Fourth District,  
March Term, A.D. 1913.

Marie Hughes, Administratrix,  
of the estate of James Hughes,

Appellee.

vs.

Wilderado Coal Mining Company,  
Appellant.

Appeal from the

Circuit Court of  
Saline County.

McBride, J.

This appeal is prosecuted to reverse judgment of \$2500.00 obtained by appellee against the appellant in the Circuit Court of Saline County.

+ It appears ~~from the record in this case~~ that James Hughes and his bud, John Dunn, were employed by defendant as shot firers in its mine, and while ~~engaged at that work and on November 28, 1912, an explosion occurred whereby the said James Hughes and John Dunn were both injured and after injuries they afterwards died.~~ <sup>which</sup> ~~First James Hughes left sur-~~ <sup>several minutes, fatal</sup> ~~viving him his widow Marie Hughes, and this suit is prosecuted by his widow as administratrix of his estate.~~ The explosion causing the death of Hughes occurred in the third and fourth west entries off of the second north entry <sup>in the</sup> ~~in appellant's mine.~~ The ~~entries involved in this suit~~ <sup>in the</sup> are the first and second north extending north and south, and the first, second, third and fourth west entries, which are turned

Term 0.00.

In the immediate past,

1900-1901.

also 1901-1902.

and the other, administratively,  
of the estate of James H. H. H.

1901-1902.

1901.

1901-1902.

1901-1902.

1901-1902.

The general is provided to reverse

the general of 1901-1902, and the general is

the general in the general of 1901-1902.

It is provided that the general is

James H. H. H. and the general is

by defect of the general, and the general is

engaged at 1901-1902, and the general is

explorer of 1901-1902, and the general is

John H. H. H. and the general is

the general is 1901-1902, and the general is

prosecuted by the general, and the general is

estate. It is provided that the general is

occurred in the general, and the general is

of the second general, and the general is

entries in the general, and the general is

north extending north and south, and the general is

third and fourth general, and the general is

to the west off of the second north. The north entries extend some distance north of the third and fourth west entries. ~~The~~ <sup>A</sup> air was circulated in said entries by means of a fan, producing a down cast of air, passing into the first north entry and after going some distance beyond the fourth west it ~~was~~ <sup>was</sup> returned through the second north to the fourth west entry and thence west through the fourth west entry and at the end of this returned <sup>by</sup> the third west to the second north and thence south to the second west entry, thence west, returning by the first west to the second north entry, and thence passing into the shaft. ~~It was contended by~~ <sup>the</sup> ~~witnesses, and there was some evidence tending to~~ <sup>show</sup> ~~that there was a squeeze in the first and second west entries which had caused the fan to~~ <sup>claiming difficulty</sup> ~~fall and to some extent stopped up these entries so that, as claimed by some of the witnesses, the passage for the air in returning to the shaft was very much smaller in these entries than in the third and fourth entries.~~ Room No. 9 is located about two-thirds of the distance west on the fourth west entry and north of the second north entry. Ten shots had been placed in these entries to be fired by Hughes and ~~his~~ <sup>his</sup> buddy Dunn. Room No. 9 had two shots placed in it. There was one shot in the face of the fourth west entry, one in the cross-cut being opened near the face of that entry, two ~~shots~~ in the face of the third west entry and two ~~shots~~ in each of the two stub entries off the third west and opposite the cross-cut marked 12 on the plat.





On the afternoon of the 25th of November Hughes and his <sup>deceased</sup> ~~buddy~~ went into these entries and fired the shots ~~there~~ located and while ~~the shot~~ <sup>being</sup> ~~were~~ being fired an explosion occurred which resulted in the injury <sup>jury</sup> ~~to~~ both ~~of~~ these shot firers. ~~There~~ <sup>It</sup> is ~~disputed~~ <sup>in</sup> ~~the evidence, and in the contention~~ <sup>of</sup> ~~of counsel, as to where the~~ shot firers commenced firing, ~~the shots~~. It is claimed by ~~counsel~~ <sup>plaintiff</sup> ~~for appellee~~ that the evidence shows they commenced firing ~~the shots~~ in the third west entry, and by ~~counsel for appellee~~ <sup>defendant</sup> that they commenced firing in the fourth west entry and fired with the air current, and ~~appellee~~ <sup>defendant</sup> contends that it ~~is~~ <sup>shows</sup> the evidence that the cause of Hughes' death was ~~the~~ <sup>fact</sup> that he fired his shots in too rapid succession and with the air, <sup>carrying</sup> ~~thereby~~ the powder smoke or carbon monoxide ~~was~~ carried from one shot to the other, resulting in an explosion, and claims ~~that he is~~ <sup>to be</sup> sustained <sup>turned</sup> ~~in this~~ by the fact that a portion of the skin of a hand which had been burned, a portion of a little finger, cap, lamp and other things were found in the third west entry. ~~Upon the other~~ <sup>hand</sup>, It ~~is~~ <sup>is</sup> contended by ~~appellee~~ <sup>plaintiff</sup> that the roadway in these entries was very dusty, and ~~that~~ the circulation of air being very poor, the dust mingled with the powder smoke and ~~the~~ firing ~~of~~ the shots in succession, ~~with~~ the standing powder smoke ignited, and combined with the dust, <sup>ignited</sup> and produced the fatal effect; and also claim that there was evidence of charred dust upon the roof and ~~parts~~ of the entry and that the dust had been burned and

[illegible]

coke and stuck to the timbers and roof of the entry, and that the dust in the air was one of the causes of the explosion.

~~It appears from the evidence that~~ Hughes and Dunn were found in the fourth west entry and at the distance of about forty feet from the second north entry. +

The declaration consists of six counts. At the conclusion of the testimony of plaintiff the court excluded the evidence and directed a verdict as to the third, fourth and sixth or additional count but refused the motion as to the first, second and fifth counts, which motion was also refused at the conclusion of all of the evidence.

\* The first count charged that the third and fourth entries were dry and dusty and that the defendant wilfully failed and neglected to have ~~said~~ entries and roadways thoroughly sprinkled or cleaned, and by reason of <sup>which</sup> ~~and in consequence of the wilful failure and neglect aforesaid, and while~~ Hughes was following his duty, and while the air in ~~said~~ <sup>the</sup> entry and cross-cut was so charged with dust, and by reason of the firing of ~~said~~ <sup>the</sup> shots the ~~said~~ <sup>causing</sup> dust became ignited and a violent explosion in the ~~said~~ entries and cross-cut thereby occurred, and injured the deceased Hughes.

The second count charged that defendant wilfully failed and neglected to conduct into the ~~said~~ working place of Hughes an amount of air sufficient to render the ~~said~~ working place reason-

direct and special to the fire and that the  
entry, and that the door in the fire was  
the cause of the explosion.

~~As the evidence is not~~

and that the door in the fire was not  
at the distance of about forty feet from the  
second north entry.

The defendant's counsel in court.

at the conclusion of the testimony of the witness  
the court excluded the evidence and directed the  
jury to find the defendant guilty of manslaughter.

count one returned the verdict of manslaughter, and  
count two returned the verdict of manslaughter, and  
count three returned the verdict of manslaughter, and  
count four returned the verdict of manslaughter.

The first count charged that the defendant  
fourth entries were dry and empty and that the de-  
fendant willfully failed and neglected to care

said entries and thereby, negligently, caused or  
caused, and by reason of said negligence of the  
defendant willfully failed and neglected to care

inches was following his duty, and while the air  
in said entry and cross-cut was so charged with  
dust, and by reason of the failure of said defendant

~~that dust became ignited and a violent explosion~~  
in the said entry and cross-cut thereby resulting  
and injured the deceased miner.

The second count charged that defendant  
willfully failed and neglected to connect into the  
said working place of inches on account of air  
sufficient to render the said working place unsafe



ably free from deleterious air, etc., and that  
26 ~~said~~ air being charged with gas and dust ~~the same~~  
became ignited <sup>causing a</sup> ~~and the~~ violent explosion occurred,  
injuring deceased.

The fifth count charged that it was the  
duty of the defendant to use reasonable care to  
furnish a reasonably safe place ~~to do his~~ <sup>in which to</sup>  
work and ~~then alleged~~ that the ~~said~~ entries and  
cross-cuts were in a dangerous condition, in that  
there had been a squeeze in the mine and the air  
passages partially closed ~~and~~ to such an extent  
that sufficient quantities of fresh air could not  
be forced through ~~said~~ passages ~~as to prevent~~ <sup>the air in the</sup> ~~the~~  
~~said~~ third and fourth entries and cross-cuts from  
becoming deleterious. ~~and charges~~ <sup>also</sup> that ~~the dust,~~  
~~gas and other inflammable substances, of which the~~  
~~defendant had knowledge, and on account of the dan-~~  
~~gerous condition of said~~ <sup>together with</sup> ~~the~~  
shots so fired ~~then and there~~ caused the ~~said~~ gas,  
dust and other inflammable substances with which  
the air in ~~said~~ <sup>the</sup> entries and cross-cuts was charged  
~~and of which defendant had knowledge~~  
~~then and there, to become ignited and a violent ex-~~  
plosion occurred ~~and~~ injured ~~the said~~ <sup>my</sup> ~~lives~~.

<sup>Proffer</sup> The original declaration then concluded  
with ~~a~~ <sup>proffer</sup> of letters of administration, etc.

The sixth or additional count was filed  
within one year of the time of the injury, and  
charged a storage of one hundred pounds of powder  
in the fourth west entry, and that the fire from  
the shots caused ~~said~~ <sup>the</sup> powder to become ignited and ~~to~~  
explode ~~and~~ <sup>in</sup> injured the deceased Hughes. This count



fully free the defendant's air, and that  
the air being cleared off, the explosion occurred  
because limited and violent explosion occurred,  
injuring deceased.

The fifth count charged that it was the  
duty of the defendant to be responsible to  
furnish a reasonably safe place for his  
work and then alleged that the said entries and  
cross-cuts were in a dangerous condition, in that  
there had been a smoke in the mine and the air  
passages partially closed and to such an extent  
that sufficient quantities of fresh air could not  
be forced through said passages and the defendant  
with third and fourth entries and cross-cuts from  
becoming deteriorated. And charges that the  
dust and other inflammable substance, of which the  
defendant had knowledge, and on account of the  
regions condition thereof, the dust from the  
shots which then and there caused the  
dust and other inflammable substance with which  
the air in said entries and cross-cuts was charged  
then and there to become limited and violent ex-

losion occurred and injured deceased.

The original declaration then concluded  
with a recital of letters of administration, etc.  
(The sixth or additional count was filed

within one year of the date of the injury, and

charged a statute of one hundred pounds of powder

in the fourth west entry, and that the fire from

the shots caused said powder to become ignited and

explode and injured the deceased. This count

then avers ~~the~~ death, survivorship, and good ~~will~~  
with damages to the amount of three thousand dol-  
lars, and ~~then~~ makes proffers of letters of adminis-  
tration, and then follows ~~with~~ this averment;  
Plaintiff further avers that the said defendant  
had elected not to be bound by an act of the General  
Assembly of the State of Illinois, commonly known  
as the compensation act, and that the plaintiff's  
intestate was bound by the terms of said act. \*

Many errors have been assigned by the appel-  
lant but we shall only attempt to pass upon such of  
them as we deem important.

One of the principal errors assigned is the  
ruling of the courts in sustaining the demurrer to  
appellant's plea of the statute of limitations,  
pleaded to the first, second and fifth counts of the  
declaration. It appears that when the original dec-  
laration consisting of five counts was filed, that  
there was no charge contained in said declaration  
that the defendant had elected not to be bound by  
what is known as the Compensation Act. Later on,  
and within one year from the date of the injury,  
the sixth or additional count was filed herein which  
contained the averment as above quoted. At the  
close of plaintiff's evidence the court, upon motion  
of appellant, excluded the evidence and directed a  
verdict as to the sixth or additional count. After  
the verdict had been returned plaintiff was given  
leave to amend the declaration, which was amended by  
inserting in each count the allegation that the defend-

then have the... with... and... trial, and... Plaintiff further... had elected not to be... Assembly of the... as the... interstate... any... but we... them as we... One of the... ruling of the... defendant's... pleaded to the... declaration... variation... there was no... that the... what is known as the... and within one... the sixth or... contained the... close of... of appellant, excluded the evidence and... verdict as to the... the verdict and been returned... leave to amend the declaration, which was... inserting in each count the allegation that the defendant

•

Appellant had elected not to be bound by the act of the General Assembly of the State of Illinois, commonly known as the Compensation Act. It is contended by counsel that in order to sustain this action it was necessary to aver and prove that the defendant had elected not to be bound by the Compensation Act. That this was a material and necessary averment and that the amendment inserting this in the first, second and fifth counts, after one year, and after the rendition of the verdict, was error. The statement here referred to as being necessary and material to each count is of a general character and is not peculiar to any particular count of the declaration but pertains to one as well as the other and we think that where a general averment of this character is contained in any one count of the declaration that the statutory requirement necessary to maintain the action has been met. This averment is of the same general character as that of next of kin, etc. It is said, "It was not error to sustain the demurrer to the plea of the statute of limitations. While it is usual in practice to aver in all the counts of the declaration, in cases of this character, that the intestate left next of kin, yet it is not necessary so to do. If the averment appears in one count, the statutory requirement necessary to maintain the action has been met. Afterwards filing additional counts, or an amended declaration making an averment of survivorship in each count, is not the statement of a new cause of action,



It had elected not to do so in the first instance.  
The General Assembly of the League of Nations  
commonly known as the League of Nations  
tended by (many) that in order to be able to  
action it was necessary to have a majority of  
detracted had elected not to do so in the first  
instance. It is not necessary to have a majority of  
every member and that the majority of members  
in the first, second and fifth years, and in  
year, and after the expiration of the first year,  
other. The statement here made is that the  
every and material to each other in the first  
character and it is well known that the  
court of the declaration and the court of the  
in the other cases the court of the first year  
next of this character is a matter of course and  
of the declaration and the statement of the  
necessity to maintain the League of Nations.  
Government is of the same character of the first  
next of this, etc. It is not necessary to have  
again the declaration of the first year in the  
limitations. It is not necessary to have the first  
in all the courts of the declaration, and the  
this character, that the declaration of the first  
yet it is not necessary to have the first  
appears in one court, but with the statement of  
every to maintain the League of Nations.  
ways, which, which, which, which, which, which,  
inaction, which, which, which, which, which, which,  
court, is not the statement of a new court of



but a restatement in an amplified form of the cause of action stated in that count of the original declaration." Chicago City Ry. Co. vs. Liddick, 139 App., 171. We think this decision is fully sustained by the cases of N. B. & W. Ry. Co. vs. Hession, 150 Ill., 557; Chicago Ry. Co. vs. Hackendahl, 128 Ill., 300; Knight vs. Union, 119 App., 411.

The excluding of the evidence and directing a verdict as to the sixth count did not strike this count from the declaration but it is still a part of the declaration for reference purposes and may furnish sufficient basis for additional counts which set forth the same cause of action in a more accurate and legal manner than was used in the stricken count. Dougherty vs. Holt, 236 Ill., 485. We are of the opinion that the declaration, when taken as a whole, stated a complete cause of action, and that the court did not err in sustaining the demurrer to appellant's plea of the statute of limitations.

It is next objected that before the plaintiff could maintain her action it was necessary to prove that defendant had filed with the Industrial Board, and had furnished to the deceased personally or posted in a conspicuous place at its plant, shop, office room or place where such employee was engaged in work, a notice of its election not to provide and pay compensation, according to the provisions of this act. This seems to be the provision



of the statute and if defendant (at least) derived of some of its defenses by reason of plaintiff's failure to make such proof then there will be some reason in saying that such proof should have been made before the action could be maintained. It is claimed by appellant that for want of such proof it is conclusively presumed to be negligent under the compensation act, and just in truth and regard to the appellant did during the progress of the trial prove certain conditions and circumstances tending to show that the negligence of the defendant was not the proximate cause of the injury, also that it was an accidental injury. If it be true that defendant was operating under the compensation act, then liability would attach, whether they were negligent or whether their conduct was the proximate cause, or whether or not it was an accident, none of which could be a defense under the compensation act. The Supreme Court, in a case where this act had been made, and where counsel upon the oral argument stated that the defendant was not under the compensation act says, "While appellant has devoted considerable space in its brief to a discussion of the sufficiency of the evidence in support of the statement in the declaration that appellant had elected not to ~~xxxxxxx~~ comply with the Workmen's Compensation Act, on the oral argument counsel for appellant conceded that it was not at the time of the alleged injury, and never had been, operating under said act, so that in the disposition of the questions here involved it will be assumed as a fact that appellant had



not elected to pay compensation for injuries in accordance with said act." Dietz vs. Big Buddy Coal Co., 263 Ill., 482. So that we believe that the attitude and defense made by appellant herein are equivalent to the declaration that they were not operating under the compensation act. Courts are reluctant to sustain objections where the objector has not been deprived thereby of any of his rights and nothing could be gained by sustaining such objections, and we believe that we are justified in assuming in this case, as the Supreme Court did in the case of Dietz vs. Big Buddy Coal Co., supra, that the appellant had not elected to pay compensation in accordance with said act.

It is next contended that the court erred in refusing to permit the witness James Johnson to testify to a declaration made by John Dunn, the buddy of deceased, to the witness at about eight o'clock that evening in support of the theory of appellant with reference to the manner in which this explosion occurred, and that they were in the third west entry at the time of the explosion. The statement offered to be proved was that Hughes and Dunn were in the third west entry at the time of the explosion and that a windy shot from No. 9 came out of the room and went through the cross-cut and blew down the brattice and caught Hughes and Dunn in the third west entry, and that as a result thereof Hughes and Dunn received the injury in question. It also appears from the evidence that Dunn died shortly after the injury and as we think,



not elected to the committee of the organization  
concerned with the case. It is the fact that  
and on the 12th of July, 1934, the committee was  
the attitude and the fact that the committee  
are equivalent to the decision to the fact that  
not operating under the investigation and the  
are reluctant to make a statement in the case  
factor has not been taken into account in the  
rights and the fact that the committee  
such objections, and the fact that the committee  
tied in the case to the fact that the committee  
did in the case of the fact that the committee  
again, that the committee has not elected to  
compensation in accordance with the fact that  
it is next concluded that the fact that  
in refusing to testify the witness is not  
testify to a statement made by the witness  
body of deceased, in the case of the fact that  
of the fact that the witness is not  
applicant with reference to the fact that  
this explosion occurred, and the fact that the  
third went with the fact that the explosion  
statement offered in the case of the fact that  
Dunn were in the fact that the fact that  
the explosion and the fact that the fact that  
out of the room and went toward the fact that  
flew down the staircase and the fact that the fact that  
in the third went with the fact that the fact that  
third witness and Dunn received the fact that  
question. It also suggests the fact that the fact that  
Dunn died shortly after the fact that the fact that

this statement that they were at the time of the explosion in the third west entry would tend to support the contention of appellant that the shots were fired with the air and the theory that the powder stroke or carbon monoxide was carried from one shot to the other resulting in the explosion, and would be against the interests of the deceased, John Lunn. As we understand the law, declarations made by a deceased person against his interests are admissible in evidence. J. Greenleaf, in his work on evidence says, "Declarations of the other class of which we are now to speak are secondary evidence and are received only in consequence of the death of the person making them. This class embraces not only entries in books but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent date; but to render them admissible it ~~declares~~ must appear that the declarant is deceased, that he possessed competent knowledge of the facts or that it was his duty to know them, and that the declarations were of variance with his interest. When these circumstances occur, the evidence is received, leaving its weight and value to be determined by other evidence. J. Greenleaf on Evidence, Sec. 142." And this section is quoted and approved of in the case of Greenleaf v. Co. v. Bartlett, 188 Ill., 173. J. Greenleaf says, "One of the peculiar features of this class of declarations is they are admissible to prove collateral or independent facts embodied in them, also

Considerations

Greenleaf  
2147



they are admissible in evidence in a suit between strangers. Hughes on evidence, sec. 9 and 10, pages 100-101. The general rule is that declarations of a third party are not admissible in evidence but where the declarant was in a position to know, as Dunn was, the matters concerning which he made this statement, and that such statements were against his interest, and that he had since become deceased, we believe that these declarations come fully within the rule, and the court erred in excluding them.

It is next urged that the court erred in giving oral instructions to the jury at the close of plaintiff's evidence. The appellant at the close of plaintiff's evidence entered a motion to direct a verdict upon each of the counts of the declaration. The court in passing upon these motions sustained the motion as to the third, fourth and sixth counts but permitted the fifth count to stand; which charges that defendant directed Hughes to work in the entries and cross-cut aforesaid when the same was then and there in a dangerous condition, in this, that there had been before that time what is known as a squeeze in said mine and by reason thereof the opening of air passages leading to the working place of Hughes were thereby partially closed to such an extent that sufficient quantities of fresh air could not by means then employed by the defendant be forced through said air passages so partially closed as aforesaid, so as to prevent said first and fourth entries off of the north entry, including

They are also interested in the possibility of using the results of the study to develop a new type of computer program that would be able to learn from experience and make decisions on its own.

10-10-1964

known, as many have, the extent to which the

... ..

fully within the rule, and the court will not

It is next item that the ...  
... ..

of scientific evidence. The quality of the

close of Plaintiff's evidence entered a motion to

...the first in the series of ...

which charges that certain individuals have been

in the entries and present also to the

that there had been before that time and a change in acid and a change in the

to further aid the development of the country and to

not by means of a single, by the use of a

closed as at present. It was also found that the



the cross-cut aforesaid, from becoming deleterious, and charged with dust, gas and other inflammable substances". The court in commenting upon this count of the declaration says, "and the next count was the fifth count. There are three counts that are based upon the statute. The five counts are based on statutory counts and the other one, the sixth one, is simply that of fact and there lay upon the duty of the defendant to provide the plaintiff with a reasonably safe place in which to work. The evidence indicates that they failed to furnish a safe place and that dust accumulated and for the reason of this the injury followed." Here the court told the jury that the evidence indicated that the defendant failed to furnish a safe place and that dust accumulated, which was certainly erroneous, and was recognized by the judge as being erroneous the moment his attention was called to it, and exceptions were taken, he directed the jury not to consider anything he may have said to them upon this matter orally, but this, in our opinion, was too late. The jury already had the knowledge that the judge believed that the evidence indicated that they had failed to furnish a safe place and that dust accumulated. Besides, the court began his statement by saying "The jury is instructed, etc." Other criticisms are made by counsel upon this oral instruction, in this, that statements were made by which other improper inferences could be drawn. We do not, however, consider it necessary to revert upon these matters as we must hold that the oral



instructions so given by the court was erroneous, and in violation of section 73 of the Practice Act. *Under our statute the Circuit Judge has no authority to instruct the jury orally in any issue in the case.* *Hefling vs. Zardt, 162 Ill., 156. Andreas vs. Fletcher, 77 Ill., 377.* Here the exception is taken immediately after the address, as was done in this case, it is sufficient to fulfill all of the legal requirements and to warrant the assignment of error. *Jarneck vs. Chicago Consolidated Brick Co., 150 App. 248.*

Objection is also urged to plaintiff's 11th instruction, which reads as follows: "Upon the question of the dangerous condition as alleged in the fifth count of the plaintiff's declaration and upon the question of the knowledge of the defendant company of such dangerous condition as therein alleged, the court instructs the jury that if they believe from a preponderance of the evidence that the dangerous condition in the mine of the defendant as alleged in the fifth count had existed therein long enough for the defendant company to have known of the same, then and in such case the plaintiff would not have to prove actual notice of such alleged dangerous condition but under such circumstances the defendant, in law, would be charged with the knowledge of the same." By this instruction, as we read it, the jury are informed that a dangerous condition existed, as charged in the fifth count of the declaration, and that the only question it had

Instructions as to the Court's findings.  
and in violation of Section 11 of the Police Act.  
Under our statute the Court has the duty to  
it to instruct the jury on the facts in the  
case. Section 11, 1891, 1892, 1893, 1894, 1895,  
1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903,  
taken immediately after the verdict, as was done  
in this case, it is sufficient to nullify all of the  
legal requirements and to prevent the operation of  
error. Section 11, 1891, 1892, 1893, 1894, 1895,  
1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903,  
1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912,  
Instruction, which reads as follows: "Upon the  
question of the defendant's guilt as alleged in the  
first count of the indictment the jury shall determine  
the question of the knowledge of the defendant and  
may if such knowledge is shown to be in dispute,  
the Court instructs the jury that it is their duty  
to be determined at the evidence that the defendant  
was in the condition in the case of the defendant as  
alleged in the first count and existed therein and  
enough for the defendant company to have known at  
the time, then and in such case the defendant shall  
not have to prove actual notice at such time as  
the defendant's condition but under such circumstances  
the defendant, in law, would be charged with the  
knowledge of the same. By this instruction, as  
we read it, the jury are informed that a dangerous  
condition existed, as claimed in the first count  
of the indictment, and that the only question is that

to determine was the length of the time it had  
existed. I believe this instruction to be error-  
neous, especially when considered in connection  
with the oral instruction that had been given by  
the court with reference to this count in the dec-  
laration.

Plaintiff's third given instruction is  
also criticised because it tells the jury that if  
the defendant was guilty of the willful violation  
charged in their first or second counts of the dec-  
laration they should find the defendant guilty. Upon  
examination of the first count of the declaration  
it will be perceived that it says, "That the de-  
fendant wilfully failed and neglected to have said  
entries and roadways thoroughly sprinkled or cleaned."

This instruction is broader than the statute. The  
statute simply provides, that "The operator of such  
mine must have such roadways regularly and thorough-

ly sprayed, sprinkled or cleaned". It has been  
repeatedly held by the higher courts of this state  
that to constitute willfulness the act charged to  
be such must be confined to such as are prohibited  
by statute.

There are many other criticisms made upon  
the instructions but upon another trial such inter-  
fections as exist can be remedied. I have not  
commented upon the evidence in this case for the  
reason that it must be submitted to another jury  
for consideration and we do not feel warranted in  
expressing any views thereon.

For the errors above indicated the judgment  
will be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

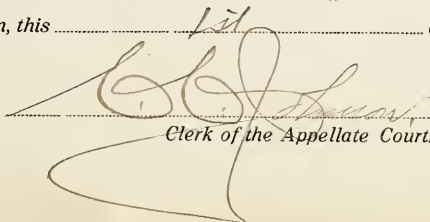
*Quinn's Act. Jan. 4, 1908, 7475 at 8200.  
See 298 1st 7501*



Not to be removed in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

NOINIC



197A267

1258

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 267

~~ERROR TO,~~  
APPEAL FROM

Thomas J. Oston  
Appellee

vs.

No. 58

March Term, 1915

Circuit COURT

Jefferson COUNTY

City of Mt. Vernon  
Appellant

TRIAL JUDGE

HON. Wm. H. Green





In the Appellate Court

Fourth District.

March Term, A. D. 1915.

Thomas J. Osburn,

Appellee.

Vs.

City of Mt. Vernon,  
Illinois.

Appellant.

Appeal from the Jefferson

County Circuit Court.

McBride, J.

This was an action commenced before a justice of peace and appealed to the Circuit Court of Jefferson County, wherein a judgment of one hundred dollars was rendered against appellant.

\* *It appears that Plaintiff*  
~~Appellant~~ <sup>was</sup> the owner of a horse which he ~~had~~ hired to John Griggs to be used by ~~him~~ in the delivering of goods, <sup>which</sup> ~~and the horse was,~~ on May 20, 1914, <sup>was</sup> ~~being~~ driven by Alva Thomas, a boy of the age of seventeen years; he had driven up Cherry Street and had just passed on to 12th street and while driving <sup>in</sup> ~~along~~ the center of the street the horse slid ~~from the center of the street~~ to the side of the street and ~~there~~ fell into a catch basin and was badly injured. The boy testified that at the time he passed on to 12th street he was driving at the rate of about seven or eight miles an hour. \* ~~It further appears from the evidence that~~

In the Appellate Court  
South District.  
March Term, A. D. 1915.

Appellant.	City of St. Vernon, Illinois.	vs.	Appeal from the Jefferson County Circuit Court.
			Appellee.
			Thomas J. Capron.

Exhibit, 1.

This was an action commenced before  
a Justice of Peace and appealed to the Circuit  
Court of Jefferson County, wherein a judgment of  
one hundred dollars was rendered against appellant.  
~~Appellant was the owner of a horse~~  
which he had hired to John Griggs to be used by  
him in the delivering of goods, and the horse was,  
on May 20, 1914, being driven by Alva Thomas, a  
boy of the age of seventeen years; he had driven  
up Cherry Street and had just passed on to 12th  
street and while driving along the center of the  
street the horse slid from the center of the street  
to the side of the street and there fell into a  
catch basin and was badly injured. The boy testified  
that at the time he passed on to 12th street he was  
driving at the rate of about seven or eight miles  
an hour. It further appears from the evidence that

12th street was paved and that the pavement was of <sup>to a</sup>  
~~the width of about twenty-four feet and that the~~  
tracks made by the horse in sliding extended from  
about the center of the street east to the catch

basin, in which he fell. The catch basin was at the  
and adjacent to the paved  
outside of ~~that~~ <sup>was</sup> portion of the street that was paved  
and adjacent thereto, and described by the mayor as  
being of the depth of twenty-four inches at the side  
next to the pavement, ~~and~~ <sup>it</sup> extended back to curb line  
thirty inches, and that north and south it is  
twenty-seven inches. ~~It further appears that~~ <sup>The</sup>  
Mayor knew of the location of this catch basin and  
at times it was covered over with a rock which lay ~~by~~  
<sup>at one side</sup> ~~the side of it but for some time the rock had been~~ <sup>put</sup>  
removed so as to permit the water from ~~the~~  
street to ~~pass~~ <sup>draw</sup> into the catch basin. An ordinance  
was introduced in evidence ~~which provided~~ <sup>just</sup> that no  
horse should be driven faster than six miles per  
hour upon any street or alley in the city, nor  
faster than four miles per hour in turning a corner. ①

+ It was stipulated that the street  
occupied and controlled by the city was of the width  
of sixty feet, and had been paved to a width of  
twenty-four feet. +

It is insisted by counsel for appellant  
that the court erred in refusing to direct a verdict  
and in overruling a motion to set aside the verdict  
and grant a new trial. There was evidence with its  
reasonable inferences tending to show that the de-  
fendant was guilty of negligence, and we do not bel-

1211 street was paved and that the paved width  
 the width of about twenty-four feet and the  
 tracks made by the horse in sliding extended from  
 about the center of the street east to the catch  
 basin in which he fell. The catch basin was at the  
 outside of that portion of the street that was paved  
 and adjacent thereto, and described by the survey as  
 being of the depth of twenty-four inches at the side  
 next to the pavement, and extended back to curb line  
 thirty inches, and that north and south it is  
 twenty-seven inches. It further appears that the  
 layor knew of the location of this catch basin and  
 at times it was covered over with rock which lay on  
 the side of it but for some time the rock had been  
 removed so as to permit the water from the  
 street to flow into the catch basin. An ordinance  
 was introduced in evidence which provided that no  
 horse should be driven faster than six miles per  
 hour upon any street or alley in the city, nor  
 faster than four miles per hour in turning a corner.  
 It was stipulated that the street  
 occupied and controlled by the city was at the width  
 of sixty feet, and had been paved to a width of  
 twenty-four feet.

It is insisted by counsel for defendant  
 that the court erred in refusing to direct a verdict  
 and in overruling a motion to set aside the verdict  
 and grant a new trial. There was evidence which the  
 reasonable inferences tending to show that the de-  
 fendant was guilty of negligence, and we do not bel-



ieve from the evidence that the court could say as a matter of law that the appellee was not in the exercise of due care and caution for his own safety; and are not able to say that the court erred in refusing to direct a verdict. Upon the motion to set aside the verdict and grant a new trial, it was claimed that the evidence was not sufficient to warrant a verdict for the plaintiff, and that the instructions given on behalf of the plaintiff were erroneous. There were errors committed upon the trial of this case which will require a reversal and we do not care to comment upon the weight of the testimony under such circumstances. The rule governing the duty of the city with reference to the care of its streets is that it shall use reasonable care to keep its streets in a reasonably safe condition for travel thereon, and this duty extends to keeping the streets reasonably free from defects or dangerous places throughout its entire width. *Boender Vs. City of Harvey*, 159 App., 333; *City of Spring Valley Vs. Gavin*, 182 Ill., 232. The duty devolving upon the traveling public requires them to exercise due care and caution for their own safety while traveling thereon. It is insisted by counsel for appellant that the mere fact that appellee's horse was being driven upon the street at a rate of speed prohibited by ordinance was sufficient to show a want of due care and caution and for that reason a verdict should have been directed. We do not believe that this is the correct rule for there might be circumstances under which a horse was



leave from the evidence that the horse could say as  
a matter of law that the accident was not in fact  
exercise of due care and caution for his own safety;  
and are not able to say that the court was in error  
in giving the verdict. Upon the motion to  
set aside the verdict and grant a new trial, it was  
claimed that the evidence was not sufficient to  
warrant a verdict for the plaintiff, and that the  
instructions given on behalf of the plaintiff were  
erroneous. There were errors committed upon the  
trial of this case which will require a reversal  
and we do not care to comment upon the weight of  
the testimony under such circumstances. The rule  
governing the duty of the city with reference to the  
care of its streets is that it shall use reasonable  
care to keep its streets in a reasonably safe con-  
dition for travel thereon, and this duty extends to  
keeping the streets reasonably free from defects  
or dangerous places throughout the entire town.  
Boender vs. City of Harvey, 139 Ill. 207; City of  
Spring Valley vs. Gavin, 182 Ill. 277. The duty  
devolving upon the traveling public is to exercise  
to exercise due care and caution for their own  
safety while traveling thereon. It is insisted by  
counsel for appellant that the mere fact that  
appellee's horse was being driven upon the street  
at a rate of speed prohibited by ordinance was suffi-  
cient to show a want of due care and caution and that  
therefore a verdict should have been directed. We  
do not believe that this is the correct rule for  
there might be circumstances under which a horse was

being driven in violation of the ordinance that it could not be regarded as a want of due care. To illustrate, if the horse should become scared and without the driver's fault attempt to run away, and the driver was unable by the exercise of due care to restrain him, such might not be a want of due care, and it is for the jury to determine under all the circumstances what was a want of due care upon the part of the driver, and as to whether such acts contributed to the injury, and we believe that this view was taken by counsel for appellant upon the trial of the case as instruction No. 3 given by the appellant recognized this doctrine; and the further fact that the rapid drive must contribute to the producing of the injury. It is, however, insisted that the court erred in the giving of appellee's instructions, especially instructions four and five, and we think these objections are well taken as instruction No. 4 requires "The defendant to keep the entire width of the street in question in a safe condition so that the life and property of persons would not be injured while passing upon, along and over its streets while using ordinary care for their safety and their property, and if you believe from the evidence that the defendant caused any hole or excavation to be made in said street, then it would be the duty of the defendant to cover or guard or protect such places and place them in a reasonably safe condition, and if you believe from all of the evidence in this case that the defendant neglected and omitted to so cover or

being driven in violation of the ordinance that  
could not be regarded as a want of due care. To  
illustrate, if the horse should become frightened  
without the driver's fault attempt to run away, and  
the driver was unable by the exercise of due care to  
restrain him, such might not be a want of due care,  
and it is for the jury to determine under all the  
circumstances what was a want of due care upon the  
part of the driver, and as to whether such care  
contributed to the injury, and we believe that this  
view was taken by counsel for appellants upon the trial  
of the case as instruction No. 3 given by the appel-  
lants and recognized this doctrine; and the further fact  
that the rapid drive must contribute to the production  
of the injury. It is, however, stated that the  
court erred in the giving of appellee's instructions,  
especially instructions four and five, and we think  
these objections are well taken as instruction No. 3  
requires "The defendant to keep the entire width of  
the street in question in a safe condition so that  
the life and property of persons would not be injured  
while passing upon, along and over the streets and  
using ordinary care for their safety and to keep prop-  
erty, and if you believe from the evidence that the  
defendant caused any hole or excavation to be made in  
said street, then it would be the duty of the defendant  
to cover or guard or protect such places and to place  
them in a reasonably safe condition, and if you  
believe from all of the evidence in this case that  
the defendant neglected and omitted to so cover or

protect the catch basin, or hole, as described in the evidence, then the defendant would be guilty of negligence." This instruction is bad, 1st. Because it requires upon the part of the city a greater degree of care than the law requires. The law only requires the city to use reasonable care to keep its streets in a reasonably safe condition, while this instruction enjoins upon the city an absolute duty of keeping the street safe for its entire width. And again, it points out and states the particular <sup>which</sup> things, if omitted, would constitute negligence. This is improper; these are matters for the jury.

Instruction No. 5 is drawn along the lines of comparative negligence, which is not the law ~~xx~~ of this ~~xxxx~~ state, and while it is true it concludes by the qualifying expression that the plaintiff must have been in the exercise of ordinary care for his own safety, which perhaps would bring the instruction within the rule laid down by Justice Scholfield in the case of Calumet Iron and Steel Co., Vs. Martin, 115 Ill., 358, but the instruction as given tells the jury that if they "Believe from the evidence that the defendant was guilty of gross negligence in allowing the hole upon said street to remain open and unprotected, if proven, and in a dangerous condition so that persons or animals passing along across and over said street might fall in and be injured, and that such dangerous condition remained for such length of time that the defendant could through ordinary care and diligence have observed



protect the catch basin, or hole, as indicated in the evidence, then the defendant would be guilty of negligence." This instruction is bad, but it requires upon the part of the city a greater degree of care than the law requires. The law only requires the city to use reasonable care to keep the streets in a reasonably safe condition, while the instruction enjoins upon the city an absolute duty of keeping the street safe for its entire width. And again, it points out and states the particular things, <sup>which</sup> omitted, would constitute negligence. This is improper; these are matters for the jury.

Instruction No. 5 is drawn along the lines of comparative negligence, which is not the law of this state, and while it is true it concludes by the qualifying expression that the plaintiff must have been in the exercise of ordinary care for his own safety, which perhaps would bring the instruction within the rule laid down by Justice Brandeis in the case of Calumet Iron and Steel Co., 254 U.S. 111, 358, but the instruction as given tells the jury that if they "believe from the evidence that the defendant was guilty of gross negligence in allowing the hole upon said street to remain open and unprotected, if proven, and in a dangerous condition so that persons or animals passing along across and over said street might fall and be injured, and that such dangerous condition existed for such length of time that the defendant could through ordinary care and diligence have observed



and put it in a reasonably safe condition and failed to do so, then this would be gross negligence and the plaintiff would be entitled to recover if he was exercising ordinary care at the time." We think that this instruction assumes to direct what particular things would constitute gross negligence, and also is subject to the criticism that it assumes that appellant was guilty of gross negligence, and the street was in a dangerous condition. It is also complained that appellant's instructions were modified by striking out at their conclusion the word "should" in this phrase, "Then you should find for the Defendant", and inserting in lieu of the word "should" the word "may". These instructions purported to set forth the law upon a certain state of facts and that if such facts were proven that the defendant would not be liable. The instructions as presented directed the jury if they found such a state of facts to exist that they should find a verdict for the defendant, leaving the jury no discretion in the matter if they found such facts to exist. The instructions as modified left with the jury still a discretion to find for the defendant, even though they might find the facts necessary to be proven to entitle the plaintiff to recover did not exist. This was prejudicial to the rights of the defendant. An instruction of that character should not be so modified.

We are of the opinion that the errors in this case are of such a character as to require a new trial, and the judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

and put it in a reasonably safe condition. It failed to do so, then this would be a case of negligence and the plaintiff would be entitled to recover. He was exercising ordinary care at the time. I think that this instruction appears to direct the particular things which constitute gross negligence, and also is subject to the criticism that it requires that appellant was guilty of gross negligence, and the street was in a dangerous condition. It is also complained that appellant's instruction was modified by striking out at their conclusion the word "should" in this phrase, "and you would find for the Defendant", and inserting in lieu of the word "should" the word "may". These instructions purported to set forth the law upon a certain state of facts and that if such facts were proven that the defendant would not be liable. The instructions as presented directed the jury if they found such a state of facts to exist that they should find a verdict for the defendant, leaving the jury no discretion in the matter if they found such facts to exist. The instructions as modified set with the jury still a discretion to find for the defendant, even though they might find the facts necessary to be proven to entitle the plaintiff to recover and not exist. This was prejudicial to the rights of the defendant. An instruction of that character should not be so modified.

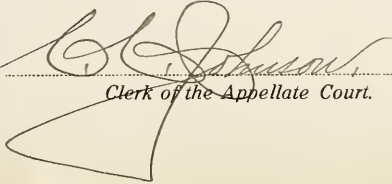
We are of the opinion that the error in this case is of such a character as to require a new trial, and the judgment of the lower court is reversed and the case remanded.

REVEREND AND HONORABLE

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... 15 ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# PINION

FILED

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1888



19742  
1259

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the.....1st.....day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....  
Silas Williams, Administrator  
.....  
of the estate of Willie Will-  
.....  
iams, deceased.  
.....  
Appellee.  
.....  
.....  
.....  
.....  
.....

vs.

No. 59

March Term, 1915

.....  
Mt. Vernon Car Manufacturing  
.....  
Company,  
.....  
Appellant.  
.....  
.....  
.....

197 I.A. 271

~~ERROR TO~~  
APPEAL FROM

Circuit COURT

Jefferson COUNTY

TRIAL JUDGE

HON. Wm. H. Green.





In the Appellate Court,  
Fourth District,  
March Term, A. D. 1915.

Silas Williams, Administrator of the estate of Willie Williams, deceased,

Appellee,

Ve.

lt. Vernon Car Manufactur-  
ing Company,

Appellant.

Appeal from the Cir-  
cuit Court of Jeff-  
erson County.

McBride, J.

Upon a trial had in the Circuit Court of Jefferson County a judgment was rendered in favor of appellee and against appellant for five thousand dollars and cost, which it is sought to reverse by this appeal. The appellant is a corporation engaged in the business of manufacturing and repairing of cars at Mt. Vernon, Illinois, and the appellee at the time of the injury and death was engaged at the work of lining cars with paper.

It appears from the evidence that the injury and death of appellee's intestate occurred on January 9, 1913, and that the appellant was not at that time operating under the compensation act of 1911, which was then in force. The plant of the

In the County Court,  
Fourth District,  
Barren County, W. Va. 1913.

Appellant.	vs.	Appellee.
St. Vernon Car Manufacturing Company.		Willie Williams, deceased, Administrator of the estate of Willie Williams, deceased.

Schmidt, J.

Upon a trial held in the Circuit Court of Jefferson County, a judgment was rendered in favor of appellee and against appellant for five thousand dollars and cost, which it is sought to reverse by this appeal. The appellant is a corporation engaged in the business of manufacturing and repairing of cars at St. Vernon, Illinois, and the appellee at the time of the injury and death was engaged at the work of fitting cars with motors. It appears from the evidence that the injury and death of appellee's intestate occurred on May 9, 1913, and that the appellant was not at that time operating under the compensation act of 1911, which was then in force. The plant of the

appellant is located near Mt. Vernon, Illinois, covers a large area of ground, and the work of constructing cars is divided into several different departments, one of which is what is known as the steel plant in which the steel car frames are built, another is the mill building, and still another is what is called the set-up shop, in which the injury in question occurred, and lies directly west of the mill building. This set-up shop is about sixty feet wide and 350 feet long and within its enclosure are three railroad tracks, commonly called north track, middle track, south track, and they are so arranged that the frames of cars are pushed in from the west on to these tracks for completion, and each track is of sufficient length to hold about eight cars, with spaces of three to six feet between each of the cars. When the cars were completed engines would push in from the west couple the cars together and pull them out to another part of the yard, and this was called pulling the track, and at such times it appears that warnings were usually given by the sounding of the whistle upon the engine, ringing the bell and by men running up and down the sides of the cars giving notice that they were about to pull the track. South of this set-up shop was what is called the paper house and to the east of that is a paint shed and still each of that are other shops. The south side of the set-up shop building was practically open, large open spaces at short intervals. At the north west corner of the

appellant is located west of the station, and the building covers a large area of ground, and the building is constructed of steel, and is divided into several different departments, and it is located on the east side of the steel plant, and the steel plant is located on the west side of the mill building, and still built, another is the mill building, and still another is what is called the set-up shop, in which the injury in question occurred, and this directly west of the mill building. This set-up shop is about sixty feet wide and 350 feet long, and within its enclosure are three railroad tracks, commonly called north track, middle track, and south track, and they are so arranged that the trains of cars are pushed in from the east on to these tracks for completion, and each track is of sufficient length to hold about eight cars, with a switch at each end, three to six feet between each of the tracks, and the cars were completed and pushed out from the west couple the cars together and pull them out to another part of the yard, and this was called pulling the track, and at such times it appears that warnings were usually given by the sounding of the whistle upon the engine, running the bell and by men running up and down the sides of the cars giving notice that they were about to pull the track. South of this set-up shop is what is called the paper house and to the east of that is a paint shed and still east of that are other shops. The south side of the set-up shop building was practically open, large open spaces at short intervals. At the north west corner of the



appellant's premises the several tracks connect with the L. & N. O. R. R. Company tracks. When the cars were standing upon the tracks in the set-up shop for completion there would be a space of from three to six feet between the cars, left for the purpose of permitting the men while engaged at work to pass in between the cars. There were about two hundred fifty men engaged in work in each of these departments. On the day in question the deceased, Willie Williams, was engaged in the finishing up of the inside of the cars and he and Albert Williams were engaged together on a car located on the middle track and at about 11:30 o'clock in the morning he went to the paper house, south of the shop, to procure some rolls of paper to be used in the lining of the car. He secured two rolls of paper and as he was returning carrying a roll of paper under each arm, as he attempted to pass between the third and fourth cars on the south ~~track~~ track he was caught between the cars and killed. It is claimed by appellee that the engine was pushed in on this south track and hooked on to these cars while the deceased was down at the paper house and that he knew nothing of the engine being there. Appellant claims that the engine was in plain view of the deceased at the time he passed in between the two cars. The custom was to attach the engine to the first car, and then to the second and afterwards to the third and so on, and it is claimed by appellant that the usual

*course was pursued at this time, and that the usual*

[illegible]

warning was given before the engine was ~~xxxxxx~~ attached to any of the cars, and as it pushed, back from car to car. As to what occurred at that time and the manner of pushing the engine and coupling up the cars the evidence is somewhat conflicting.

The declaration consists of two counts, and the charge of negligence upon the part of the defendant is substantially the same in each count, and charges that, "The said agents and servants of the defendants in charge of said locomotive, and who were not then and there fellow servants of said plaintiff's intestate in and about the hauling of said freight cars then and there standing upon said track as aforesaid out of said set-up shop, and without any reasonable warning, notice or signal of their intention so to do, and without adopting measures of precaution by which the on coming of said locomotive was made known to or could have been ascertained by plaintiff's intestate, negligently and carelessly drove and propelled or caused to be driven or propelled the said locomotive engine on, over and along said track and upon, to and against the first of said cars then and there standing on said track as aforesaid, with such force as to violently push and move said cars forward and to cause all of said cars standing on said track to crash and bump together with great force and violence, by means whereof plaintiff's intestate in the exercise of due care

warning was given before the engine was started  
attached to any of the cars, and as it started,  
back from car to car, as to what occurred at  
that time and the manner of moving the engine  
and coupling in the cars the evidence is somewhat  
conflicting.

The declaration consists of two counts,  
and the charge of negligence is on the part of the  
defendant is substantially the same in each count,  
and charges that, "The said agents and servants  
of the defendant in charge of said locomotive,  
and who were not then and there fellow servants of  
said plaintiff's intestate in and about the handling  
of said freight cars then and there standing upon  
said track as aforesaid out of said section,  
and without any reasonable warning, notice or  
signal of their intention so to do, and without  
adopting measures of precaution by which the  
coming of said locomotive was made known to or  
could have been ascertained by plaintiff's inter-  
state, negligently and carelessly drove and pro-  
pelled or caused to be driven or propelled the  
said locomotive engine on, over and along said track  
and upon, to and against the first of said cars  
then and there standing on said track as aforesaid,  
said, with such force as to violently push and  
move said cars forward and to cause all of said cars  
standing on said track to crash and burn together  
with great force and violence, by means thereof  
plaintiff's intestate in the exercise of the duty



and caution for his own safety and without notice or means of knowledge of the on coming of said locomotive as aforesaid, was then and there ~~xxx~~ crossing tracks between two of said cars so standing upon said tracks as aforesaid, in the necessary discharge of his duty as a liner and he was caught and crushed, etc. "

Upon the hearing of this cause the appellant at the close of plaintiff's evidence, and at the close of all of the evidence, entered a motion to direct a verdict, and also after verdict entered a motion for a new trial; all of which motions were overruled, and are assigned as error. Appellant also assigns as error the giving of instructions for appellee, and the refusal and modification of appellant's instructions. In the view we take of this case we will not attempt to consider or weigh the evidence, as a new trial will have to be granted herein and we consider it improper to comment at length upon the evidence or the weight of it. The evidence introduced on behalf of the plaintiff was necessarily of a negative character, and some of the witnesses by their statements claimed to be in a position to hear and know whether or not the whistle blew, the bell rang and other warnings were given of appellant's attempt to couple on to the cars. While others upon cross-examination, admit that they were not in such a position as to be fully cognizant of these matters; while others admit that they did not know and could



and caution for his own safety and the safety of others  
or means of knowledge as the in position of said  
locomotive as aforesaid, was then and there  
crossing tracks between two of said cars in such  
in upon said tracks as aforesaid, in the necessary  
discharge of his duty as a driver and he was careful  
and careful, etc.

Upon the hearing of this cause the evidence  
at the close of plaintiff's evidence, and at the  
close of all of the evidence, entered a motion for  
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were overruled, and the assigned error. Appell-  
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examination, admit that they were not in such a  
position as to be fully cognizant of these matters;  
while others admit that they did not hear and

not say whether the whistle blew and warnings were or were not given. Upon the other hand, a greater number of witnesses who claim to be in a position to know testified that several blasts of the whistle were blown, bell rang and warnings given in the usual manner by men passing up and down the track shouting to look out on the south track. It would be improper, under the state of this record, for us to attempt to weigh this testimony and decide the case upon its merits but the character of the testimony is referred to for the purpose of showing the necessity for accurate instructions to the jury. We are of the opinion that many of the instructions were inaccurate and on that account a new trial will have to be awarded in this case.

Complaint is made of the giving of plaintiff's fifth, sixth and seventh instructions, because they fail to give a proper rule of law as to the negligence of defendant. The declaration charges, in substance, that without any reasonable warning, notice or signal of their intention as to do, and without adopting measures of precaution by which the oncoming of said locomotive was made known, or could have been ascertained by plaintiff's intestate, the defendant negligently and carelessly drove and propelled the said engine against the first of said cars with such force as to cause all the cars standing on said track to crash and bump together with great force and violence.

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first of said cars with such force as to cause the  
the cars standing on said track to crash and  
together with great force and violence.

The fifth instruction given does not confine the negligence to that charged in the declaration but says, "And if the jury further believe from the evidence that the death of said Willie Williams was caused, sustained by him, arising out of and in the course of his employment and due to negligence on the part of the defendant, then and in that case even though the jury may further believe from the evidence that the death of said Willie Williams was approximately caused by his own contributory negligence, under the law the defendant company is liable."

The sixth instruction states that if the jury believe from the evidence that at the time the plaintiff "was in the employ of the defendant company, and if you further believe from the evidence that the death of said Willie Williams was directly caused by injuries sustained by him arising out of and in the course of his employment", that it is no defense that he assumed the risk, or that death was caused by the negligence of a fellow servant.

Instruction seven is of the same character and contains substantially the same language with reference to defendant's negligence. It will be observed by these instructions that the defendant's negligence was not limited to the negligence charged in the declaration but was allowed to extend to any character of negligence that the jury might consider.

The appellant by its eighth instruction re-



The fifth instruction given does not contain the negligence to that charged in the declaration and says, "And if the jury further believe from the evidence that the death of said Willie Williams was caused, sustained by him, arising out of and in the course of his employment and due to negligence on the part of the defendant, then and in that case even though the jury may further believe from the evidence that the death of said Willie Williams was so proximately caused by his own contributory negligence, under the law the defendant company is liable."

The sixth instruction states that if the jury believe from the evidence that at the time the plaintiff was in the employ of the defendant company, and if you further believe from the evidence that the death of said Willie Williams was directly caused by injuries sustained by him arising out of and in the course of his employment, that it is no defense that he assumed the risk, or that death was caused by the negligence of a fellow servant.

Instruction seven is of the same character and contains substantially the same language with reference to defendant's negligence. It will be observed by these instructions that the defendant's negligence was not limited to the negligence charged in the declaration but was allowed to extend to any character of negligence that the jury might consider.

The eighth instruction



cited the negligence charged in the declaration and sought to confine the negligence to that so charged, and concluded by telling the jury that unless the negligence was of the character so described and charged in the declaration you should then find the defendant not guilty. The court modified this instruction by striking out the word "should" and inserted the word "may", so that the instruction then told the jury that they may find the defendant not guilty. And the same word was stricken out and inserted in other instructions for appellant which we think was erroneous. Where the instruction is based upon the facts charged and in evidence, and the jury find adversely to the plaintiff upon those facts, it would then be the duty of the jury to find the defendant not guilty but by this modification the duty was removed and the discretion given. We think all of these instructions were harmful and erroneous. No recovery could have been had except on the negligence charged in the declaration. C. B. & Q. R. R. Vs. Levy, 160 Ill., 385. In Camp Point Lfg. Co. Vs. Ballou, Admr., 71 Ill., 417, it appears that an instruction had been given at the instance of the plaintiff which did not restrict the right of recovery to such defects as had been particularly alleged, the court says, on page 419, "There was evidence given of several defects in the machinery not alleged in the declaration, and the instructions should have confined the right of recovery to the defects

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...tion. C. H. & L. v. ... 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

specified in the declaration. It is insisted that the error is obviated by other instructions for the plaintiff, which predicate the right of recovery on the deceased having been killed by the defendant's negligence, in manner and form as alleged in the declaration. but, after having been instructed that the plaintiff might recover if the accident was caused by any defect in the machinery, the jury would not feel called upon to search through the various counts of the declaration to find out what particular defects were therein complained of. That would be unimportant, if there could be a recovery on account of any defect. Nor does defendant's instruction, restricting the right of recovery to the causes of action alleged in the declaration, cure the error."

Again, it is said in *Chicago & Alton Ry. Co. Vs. Rock*, Admr., 72 Ill., 141, "The second and fifth instructions were, further, too broad in allowing a recovery for negligence in general respects, without limitation to the particulars of negligence specified in the declaration."

"It is elementary that recovery can only be had on the negligence charged in the declaration." *Crane Vs. Hogan*, 228 Ill., 338.

"In *C. B. & Q. R.R. Co. V. Levy*, 160 Ill., 385, supra, it was held "that an instruction in an action for personal injuries, allowing recovery if the defendant was guilty of negligence

specified in the declaration. It is stated that the error is obviated by other instructions for the plaintiff, which relate to the right of recovery on the deceased having been killed by the defendant's negligence, in manner and form as alleged in the declaration. But, after having been instructed that the plaintiff must recover if the accident was caused by any defect in the machinery, the jury would not feel called upon to search through the various counts of the declaration to find out what particular defects were therein complained of. That would be unnecessary, if there could be a recovery on account of any defect. For does defendant's instruction, restricting the right of recovery to the cases of action alleged in the declaration, cause any error."

Again, it is said in *Chicago & Alton Ry. Co. v. Lock*, 123 Ill. 411, 412, 100 second and fifth instructions were, first, "to allow in allowing a recovery for personal injuries, general respects, without limitation to the particulars of negligence specified in the declaration."

"It is elementary that recovery can only be had on the negligence charged in the declaration." *Chane v. Hoyer*, 228 Ill. 430.

"In *Ill. R. Co. v. B. & O. R. Co.*, 111, 385, supra, it was held 'that in instruction in an action for personal injuries, allowing recovery if the defendant was guilty of negligence



contributing to the injury, was erroneous as failing to confine the recovery to the particular negligence alleged in the declaration." *Hatner V. Chicago City Ry. Co.*, 233 Ill., 173. In a later case the Supreme Court said, "In the *Hatner* case the instruction was held bad because it did not limit the negligence of the defendant which would warrant a recovery to that charged by the declaration, and it was further held that the instruction was not cured by other instructions which did confine the right of recovery to the proof of negligence charged by the declaration." *Hackett Vs. Chicago City Ry. Co.*, 235 Ill., 131.

The fifth instruction given upon ~~xxxxxx~~ behalf of the appellee did direct a verdict, and the sixth and seventh implied that a verdict should be given for the plaintiff by saying that the matters therein specified would be no defense.

Complaint is next made of appellee's eighth instruction upon the question of damages, which says, "The court further instructs the jury that if you find the defendant guilty, if you should do so, and come to consider the damages, if any, you will allow the plaintiff, then and in that case the plaintiff is entitled to recovery in this action for the exclusive benefit of the widow and next of the kin of said deceased, such damages as the jury may believe from the evidence the said widow and next of kin have sustained by reason of said death, not to exceed in all, however, the sum of ten thousand dollars." This instruction is too broad and allows the jury



contributing to the injury, the instruction was  
 failing to confine the recovery to the negligent  
 negligence alleged in the declaration. The  
 Chicago City Ct., 103 Ill. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

to take into consideration as element of damages matters not necessarily included in the statute. The statute is, "And in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death, etc." The Supreme Court in commenting upon an instruction of this character says, "The instruction was wrong upon the point of damages in telling the jury they might find for the plaintiff such damages as in their judgment from the evidence in the case the plaintiff ~~ought~~ ought to recover. This left the jury free scope to give such damages as, according to their individual notions of right and wrong, they might think the plaintiff ought to recover, unguided by any legal rule of damages, and without regard to the damages sustained." Luren Coal & Ice Co., Vs. Howell, 204 Ill., 515. "Plaintiff's instruction "C", which was given by the court, is in regard to the measure of damages, and is objectionable in the same respect as was the instruction on the same subject which was condemned in Illinois Central Railroad Co. Vs. Johnson, 221 Ill., 42, on the authority of many cases there cited, viz., it leaves the jury to fix the damages, if any, without requiring them to limit the assessment to the amount of actual pecuniary damages sustained, as shown by the evidence." Fowler Vs. C. & E. I. R. R. Co., 234 Ill., 625. The instruction here given to appellee did not limit the damages to the pecuniary

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 may give such damages as they shall deem fair and  
 just compensation with reference to the pecuniary  
 injury resulting from such death, etc." The Supreme  
 Court in commenting upon an instruction of this  
 character says, "The instruction was wrong upon the  
 point of damages in telling the jury they should  
 find for the plaintiff such damages as in their  
 judgment from the evidence in the case the plaintiff  
 ought to recover. It left the jury free  
 to give such damages as, according to their  
 individual notions of right and wrong, they might  
 think the plaintiff ought to recover, and thereby  
 to give such damages, and with it regard to  
 the damages sustained." When Court said so, the  
 Howell, 204 Ill., 625. "Plaintiff's instruction  
 'C', which was given by the court, is in regard  
 to the measure of damages, and is correct in the  
 in the same respect as was the instruction in the  
 same subject which was condemned in *Chicago & North  
 Western Ry. Co. v. Johnson*, 229 Ill., 44, and the  
 authority of many cases there cited, viz., *Ill. Rev. Stat.*  
 the jury to fix the damages, it says, 'without  
 limiting them to find the amount to be paid  
 of actual pecuniary damages sustained, or to give  
 the evidence.' *Howell v. C. & N. W. Ry. Co.*,  
 204 Ill., 625. The instruction is given to  
 appellate did not limit the damages to the pecuniary

damages resulting from the death of plaintiff's intestate.

We are of the opinion that the instructions given herein were erroneous and that the case was of that character that required accurate instructions, and because of such erroneous instructions the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

and are reported from the year of 1911.

interstate.

are of the opinion that the instructions given herein were erroneous and that the character of that character that required corrective action, and because of such erroneous instructions the judgment of the lower court is reversed and the cause remanded.

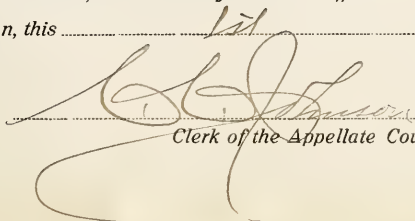
Reversed and remanded.

Not to be reported in full.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this ..... day of December,  
A. D. 1915.

  
Clerk of the Appellate Court.

# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 1st day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 278

*Charles Rushing*  
*Appellant*

ERROR TO,  
APPEAL FROM

No. 6 W  
March Term, 1915

vs.

*Circuit* COURT

*O. L. Bartlett*  
*Appellee*

*Pulaski* COUNTY

TRIAL JUDGE

HON. *Wm. A. Butler*



In the Appellate Court,

Fourth District,

March Term, A. D. 1915.

Charles Rushing,

Appellant,

Vs.

O. L. Bartlett,

Appellee.

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(  
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(  
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)  
(

Appeal from Pulaski County

Circuit Court.

McBride, J.

The defendant in the court below filed a demurrer to plaintiff's declaration, which was sustained by the court, and the plaintiff having elected to stand by his declaration judgment was thereupon rendered against him for costs and he now seeks a reversal of this judgment.

The declaration and demurrer in this case are substantially the same as the declaration and demurrer in the case of L. D. Reese Vs. O. L. Bartlett, decided at the present term of this court, and the same questions are made and argued in this case as in that one, so that the opinion filed in that case is adopted as the opinion in this case and the judgment of the lower court is reversed and remanded with directions to overrule the demurrer.

JUDGMENT REVERSED AND REMANDED WITH  
DIRECTIONS.

Not to be reported.



In the Appellate Court,  
Fourth District,  
March Term, A. D. 1915.

Charles Manning,	)
Appellant,	)
vs.	)
O. L. Bartlett,	)
Appellee.	)

Appeal from Municipal Court.

Schilde, J.

The defendant in the court below  
filed a demurrer to plaintiff's declaration, which  
was sustained by the court, and the plaintiff  
having elected to stand by his declaration judgment  
was thereupon rendered against him for costs and he  
now seeks a reversal of this judgment.

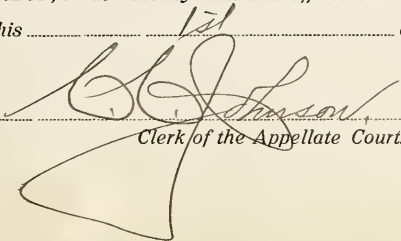
The declaration and demurrer in this  
case are substantially the same as the declaration  
and demurrer in the case of I. E. Reese vs. O. L.  
Bartlett, decided at the present term of this court,  
and the same questions are made and argued in this  
case as in that one, so that the opinion filed in  
that case is adopted as the opinion in this case and  
the judgment of the lower court is reversed and re-  
manded with directions to overrule the demurrer.

JUDGMENT REVERSED AND REMAND WITH  
COSTS.

Not to be reported.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# OPINION

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197A 279

1262

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff

And afterwards, to-wit: On the 12th day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

197 I.A. 279

~~ERROR TO~~  
APPEAL FROM

No. 74 vs.

March Term, 1915

Circuit COURT

Madison COUNTY

Marine Milk Condensing Co.  
Appellant

TRIAL JUDGE

HON. Louis Bernsenter





In the Appellate Court,  
Fourth District,  
March Term, A. D. 1915.

Jacob C. Schmidt,  
Appellee.

Vs.

Marine Milk Condensing  
Company,  
Appellant.

Appeal from the Circuit  
Court of Madison County,  
Illinois.

McBride, J.

This suit was instituted and first tried before a Justice of the Peace and from thence appealed to the Circuit Court of Madison County, and is now brought to this court for review.

It appears from the record in this case that appellant, a corporation, with its principal office in St. Louis, was engaged in the business of purchasing milk at Marine, Illinois, and that the ~~plaintiff~~ <sup>the defendant</sup> ~~appellee~~ had been delivering milk to appellant and <sup>the defendant</sup> ~~that~~ the delivery for each month <sup>being</sup> ~~would be~~ settled and paid for on about the 15th of the succeeding month. ~~It further appears that~~ <sup>the plaintiff</sup> ~~during the month~~ <sup>the defendant</sup> of October 1913, ~~appellee~~ <sup>the plaintiff</sup> had delivered to ~~appellant~~ <sup>the defendant</sup> 6563 pounds of milk and that on about the 11th or 12th of November <sup>the plaintiff</sup> ~~appellee~~ visited the office of ~~appellant~~ <sup>the defendant</sup> in St. Louis and there met Mr. Grafeman, the President. ~~He says~~ <sup>the</sup> the purpose of his visit was to make prices for milk for six months from October

In the Appellate Court,  
Northern District,  
March 10, 1913.

Appeal from the Circuit Court of Madison County, Illinois.	vs.	Jacob G. Schmidt, Appellee.
		Marine Milk Condensing Company, Appellant.

McBride, J.

This suit was instituted and first tried before a Justice of the Peace and from thence appealed to the Circuit Court of Madison County, and is now brought to this court for review.

It appears from the record in this case that appellant, a corporation, with its principal office in St. Louis, was engaged in the business of purchasing milk at various dairies, and that the appellee had been delivering milk to appellant, and that the delivery for each month would be settled and paid for on about the 15th of the succeeding month. It further appears that during the month of October 1912, appellee had delivered to appellant 6500 pounds of milk and that on about the 15th or 12th of November, appellee visited the office of appellant in St. Louis and there at that time was the president. He says the purpose of his visit was to make prices for milk for six months from October

1st, and ~~says that~~ <sup>company that</sup> he then had a conversation <sup>the defendant who told him</sup> with the President of ~~Appellant and says,~~ "1.85 per hundred ~~was what was said~~ <sup>him</sup> would be paid ~~to me~~ for six months beginning October 1st, 1913. The milk to be delivered ~~at Marine~~. Shortly thereafter and on about the 5th of December, the ~~appellant~~ <sup>defendant</sup> caused to be published in the Marine Telegram, the following notice: "Notice is hereby given that the Marine Milk Condensing Company guarantees an average price of \$1.85 per hundred for milk for the six months beginning October 1st and ending April 1st. Henry Rieke, Manager." <sup>The plaintiff</sup> Appellee saw and read this notice about the time of its insertion and continued to deliver milk to ~~appellant~~ <sup>the defendant</sup> until April 1st. At the end of each month a statement was sent from the ~~St. Louis office~~ <sup>the defendant</sup> to their agent at Marine, together with a check for the amount of milk delivered during that month. It appears that for the month of October the check was \$1.75 per hundred; February \$1.80 per hundred, and March \$1.75 per hundred, and the other months was \$1.85 per hundred. ~~That~~ <sup>that</sup> at each time when the check was below \$1.85 ~~appellee~~ <sup>he</sup> ~~says that he~~ complained to the agent that it was not enough but accepted the check and cashed it and upon the payment of the last check ~~appellee~~ <sup>he</sup> told the agent of ~~appellant~~ <sup>the defendant</sup> at Marine, Illinois, that unless they paid the balance to make up the \$1.85 ~~that~~ he would sue them. The balance was not paid and this suit was brought to recover the same. B

There is no dispute about the facts in this case, except that appellant contends that the average price for the milk, even if appellee's theory

last, and says that he then had a conversation  
 with the President of the United States, and  
 per hundred was what was paid for the milk  
 for six months beginning October 1st, 1913.  
 after and on about the 1st of October, the  
 caused to be published in the Spring field  
 following notice: "Notice is hereby given that  
 Spring Milk Condensing Company has been  
 price of \$1.85 per hundred for milk for the six  
 months beginning October 1st and ending April 1st.  
 Henry Hicke, Manager." The notice was read to the  
 notice about the time of its insertion and continued  
 to deliver milk to appellant until April 1st.  
 the end of each month appellant was sent a check  
 to their agent at Laramie, Wyoming, with  
 with a check for the amount of milk delivered dur-  
 ing that month. It appears that for the month of  
 October the check was \$1.75 per hundred; for  
 \$1.80 per hundred, and each \$1.75 per hundred,  
 and the other months was \$1.80 per hundred. At  
 at each time when the check was below \$1.80  
 says that he complained to the agent and it was  
 not enough but accepted the check and continued  
 upon the payment of the last check appellant  
 the agent of appellant at Laramie, Wyoming, and  
 unless they paid the balance to make up the \$1.80  
 that he would sue them. The balance was not paid  
 and this suit was brought to recover the same.  
 There is no dispute about the facts in  
 this case, except that appellant contends that the  
 average price for the milk, even if appellant's



is correct, would only be \$20.12.

Appellant's contention is, first.- That the notice published in the paper guaranteeing an average price of \$1.85 per hundred for milk for the six months beginning October 1st, was not such a contract as could be enforced at law. Second.- That the acceptance and retention by appellee of the checks was a settlement between the parties. The question of appellee having been paid at the end of each month, and accepted the check given him cannot, in our judgment, be considered as a settlement so as to deprive appellee of any balance that might be coming. The testimony is, that at the end of each month, when the price was below \$1.85 he protested against accepting this price and claimed that he was to have \$1.85, so we do not think that appellee would be deprived of suing for any balance due him by reason of having accepting the checks. They were only accepted by him as part payment.

The next proposition that there was no contract binding appellant to pay any specified price for the milk delivered by appellee for the six months period beginning October 1st, 1913, and ending April 1st, 1914, is not free from difficulties. It appears from the evidence that after appellee had delivered the October milk, and before it was paid for, he saw the President of the Company and the President told him, in substance, that he would be paid for all the milk delivered by him between the first day of October and the first day



is correct, would only be \$0.10.

Appellant's contention is, first--

the notice published in the paper guaranteeing an average price of \$1.85 per hundred for milk for the six months beginning October 1st, was not such a contract as could be enforced at law. Second-- That the acceptance and retention by appellee of the checks was a settlement between the parties. The question of appellee having been paid at the end of each month, and accepted the check, given him cannot, in our judgment, be considered as a settlement so as to deprive appellee of any balance that might be coming. The testimony is, that at the end of each month, when the price was below \$1.85 he protested against accepting this price and claimed that he was to have \$1.85, so we do not think that appellee would be deprived of suing for any balance due him by reason of having accepting the checks. They were only accepted by him as part payment.

The next proposition that there was no contract binding appellant to pay any specified price for the milk delivered by appellee for the six months period beginning October 1st, 1913, and ending April 1st, 1914, is not free from difficulties. It appears from the evidence that after appellee had delivered the October milk, and before it was paid for, he saw the President of the Company and the President told him, in substance, that he would be paid for all the milk delivered by him between the first day of October and the first day

of April at the rate of \$1.85 per hundred. Shortly thereafter he saw the notice above quoted, in the Marine Telegram and says that he did continue to deliver the milk each month up to April 1st, and the milk was received each month by appellee. We think there is enough in the statement made by the President to appellee, that he would be paid at the rate of \$1.85 per hundred for all milk delivered during this period, sufficient of itself to bind the appellant to pay this amount. It is true, that upon cross examination the appellant said that he did not take his conversation with the President as a contract, and in another part of his cross-examination <sup>both</sup> says he relied/upon the conversation and the advertisement published. It is argued that the contract lacked mutuality and that appellant was not bound to purchase and pay a specified price for the milk unless appellee was bound to sell and accept such specified price. If appellee was here seeking to recover upon an executory contract then the doctrine invoked would be applicable but we do not believe that where an offer of this character is made, and the person to whom the offer is given has complied with the promises that he could be deprived of the price stated, either in a conversation or in a paper. We think that where an offer has been made to pay a specified price for the delivery of an article, that while such offer remains in force there could be no reason in saying that where one performs the matter requested that he could not receive the price offered. This doctrine is recog-



nized by our Supreme Court and, quoting from Parsons, approves the following doctrine: "In commenting on this class of cases, the author says: Here it is said that the party making the promise is bound, while the other is at liberty to do anything or nothing. But this is a mistake.

The party making the promise is bound to nothing until the promise, within a reasonable time, engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement or such ~~thing~~ doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation. So if the promisee begins to do the thing in a way which binds him to complete it, here is also a mutuality of obligation. But if, without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a complete consideration, and the original promise to do something if the other party would do something, is a continuing promise until that other party does the thing required of him." Plumb Vs. Campbell, 129 Ill., 106.

It is said by counsel for appellant that this is in the nature of an advertisement, or invitation, for appellee to deal with appellant, and



nized by our Supreme Court and, must be true.

Parsons, approves the following doctrine: "The commenting on this class of cases, the author says: Here it is said that the party making the promise is bound, while the other is at liberty to do any thing or nothing. But this is a mistake.

The party making the promise is bound to nothing until the promise, within a reasonable time, engages to do, or else does or begins to do, the thing which is the condition of the first promise.

Until such engagement or such thing done, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation. As if the promisee begins to do the thing in a way which binds him to complete it, here is also a mutuality of obligation. But if, without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a complete consideration, and the original promise to do something if the other party would do something, is a continuing promise until that other party does the thing required of him." *Plumb vs. Campbell*, 123 Ill., 106.

It is said by counsel for appellant that this is in the nature of an advertisement, or invitation, for appellee to deal with appellant, and



that until they get together and some agreement is made that it amounts only to an advertisement. We do not believe that it comes within that class of cases. It is more in the nature of a reward or premium offered as an inducement to appellee and others to furnish appellant with milk during the winter months, or in the nature of a conditional promise that if he would furnish milk during these months that they would pay a certain price. Of course, he could not receive this price unless he complied with the conditions of the offer; but if he did comply with the conditions of the offer in an entirety we see no reason why he should not recover according to the conditions, and we think this doctrine is fully sustained by the case of Williams Vs. West Chicago St. R.R. Co., 99 Ill., 610. Counsel for appellant refer to the case of Smith Vs. Weaver, 90 Ill., 392, as being conclusive of the matters here presented but upon reading that case it will be observed that there was a proviso in it providing that if the party paying the money built the house this fall, or wished to get the lumber for his house this fall, and the evidence showed that he did not build. We do not think the case is decisive of this question at all.

It is next insisted that the contract is void under the Section of the ~~statute~~<sup>stat</sup>, which provides "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company----- shall be fined-----, and all contracts made in violation of this section shall



be considered gambling contracts and shall be void," and refers to the case of Snyder et al Vs. Turner, 130 Ill., 28, in support of the position here assumed. We have read this case and also the case of Minnesota Lumber ~~Co. Vs. Coal Company~~ Company Vs. Coal Company, 160 Ill., 98, where the above case is commented upon, and it is there held that the offer to purchase in the case of Snyder Vs. Turner, Supra, was simply an option, and they say in the case of Minnesota Lumber Co. Vs. Coal Company, Supra, "It is the duty of the courts to give a reasonable construction to the contracts of parties, and to effectuate their intention if possible. By no reasonable construction can it be said, that the modified agreement of August 21 was the contracting for a mere choice, right or privilege of selling or buying coal at a future time. The parties agree to make actual sales and purchases with the intention of delivering and accepting the coal". We do not believe that the case at bar comes within that class of cases, or that they would be prohibited by law from making a conditional offer for the delivery of milk as this was. As before stated, the appellee went to see the president of the company and the president told him that he would be paid \$1.85 per hundred for milk delivered from October 1st to April 1st, and while it is true on cross-examination he said he did not regard this as a contract, and while he may not have so regarded it, his counsel insist that it was a contract and we do not believe that appellee would be estopped from recovering simply because he put

be considered gambling contracts and a bill of exchange  
and refers to the case of *Turner et al. v. Turner*,  
130 Ill., 32, in support of the position here  
assumed. I have read this case and also the case  
of *Illinois Lumber Company v. Coal Company*, 160  
Ill., 98, where the above case is commented upon,  
and it is there held that the offer to purchase is in  
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to the contracts of parties, and to effectuate their  
intention if possible. By no reasonable construction  
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August 21 was the contract for a mere choice,  
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a conditional offer for the delivery of milk as there  
was. As before stated, the appellee went to see  
the president of the company and the president told  
him that he would be paid \$1.85 per hundred for milk  
delivered from October 1st to April 1st, and while  
it is true on cross-examination he said he did not  
regard this as a contract, and while he may not  
have so regarded it, his counsel stated that it was  
a contract and we do not believe that appellee would  
be estopped from recovering simply because he put



a wrong legal interpretation upon the facts stated, and in our opinion if no other contract or inducement had been offered to deliver this milk and the milk was delivered for six months, as the evidence shows it was, then appellee certainly would be entitled to recover at the price promised.

Some complaint is made of the refusal to give instructions for appellant but no particular reason is pointed out, except the general propositions that have been argued and passed upon, and that the court was warranted in refusing such instructions. Appellant, however, by its third instruction that was offered and given by the court on its behalf tells the jury that even though appellant offered to pay the price of \$1.85 by insertion in the paper as aforesaid, "Still unless you further believe that the plaintiff Schmidt delivered milk to the defendant for said six months period then the plaintiff is not entitled to recover." The instruction here offered by appellant and given by the court is in perfect accord with the views herein expressed, and that appellant itself on the trial recognized the doctrine that if the milk was delivered in pursuance of the published notice that he would be entitled to recover.

Complaint is made that the verdict is excessive. We believe this is true. The contract was not that the milk each month should be \$1.85 but for a period it should average that for each month, and in making a computation for the average for the period we find that the average price paid was one dollar and eighty and five-sixth cents and that there



a wrong legal interpretation upon the facts stated, and in our opinion it is not correct to say that the milk had been ordered to be delivered for six months, as the evidence shows it was, then appellee certainly would be entitled to recover of the rice mill.

Some complaint is made in the record as to the five instructions for appellant but no objection is pointed out, except the general instruction that have been argued and passed upon, and that the court was warranted in refusing such instructions. Appellant, however, by its third instruction was offered and given by the court on the behalf tells the jury that even though appellant offered to pay the price of \$1.35 by instruction in the paper as aforesaid, "I will advise you further believe that the plaintiff should deliver milk to the defendant for said six months period then the plaintiff is not entitled to recover." The instruction here offered by appellant and given by the court is in perfect accord with the views herein expressed, and that appellant itself in the trial recognized the doctrine that if the milk was delivered in pursuance of the published notice that it would be entitled to recover.

Complaint is made that the verdict is excessive. We believe this is true. The contract was not that the milk each month should be \$1.35 but for a period it should average that for each month, and in making a computation for the average for the period we find that the average price paid was nine dollar and eighty and five-tenths cents and that the

was a shortage on price of four and one-sixths cents and that the total amount of milk delivered for the six months was forty-eight thousand three hundred twenty (48,320) pounds, which would result in a verdict of \$20.12, and the verdict is excessive by \$2.84.

We find no errors in the ruling and judgment of the court and no reason for disturbing this verdict, except that it is excessive. On account of the excessive judgment the cause will be reversed and remanded unless the appellee files with the clerk of this court a remittitur of \$2.84 within thirty days from the date of filing this opinion, and upon the filing of such remittitur the judgment of the lower court will be affirmed.

Not to be reported in full.

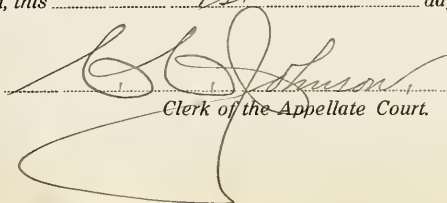
was a shortage on price of four and one-sixths cents and that the total amount of milk delivered for the six months was forty-eight thousand three hundred twenty (48,320) pounds, which would result in a verdict of \$20.12, and the verdict is excessive by \$2.84.

The find no errors in the finding and judgment of the court and no reason for disturbing this verdict, except that it is excessive. On account of the excessive judgment the cause will be reversed and remanded unless the appellee files with the clerk of this court a remittitur of \$2.84 within thirty days from the date of filing this opinion, and upon the filing of such remittitur the judgment of the court will be affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... 12 ..... day of December, A. D. 1915.

  
Clerk of the Appellate Court.

# PINION

FILED

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NATIONAL BANK OF THE REPUBLIC  
OF CHICAGO, a corporation,  
Defendant in Error,

vs.

FRANCIS CROPPER,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 296

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This action was brought by the plaintiff Bank on seven checks drawn by defendant Cropper to the order of Joseph Klor and by him endorsed in blank, each for the sum of \$91.66, dated respectively Aug. 15, Oct. 16, Nov. 15, Dec. 14, 1907, March 14, Aug. 15, and Oct. 19, 1908. Klor was the landlord of Cropper and each check was given for a month's rent. Klor was accustomed to hold checks for a long time before presenting them to the Bank for payment. Cropper had been Klor's tenant for years and gave him a check for rent every month. All the checks so given had been paid by the Bank and returned to Cropper except the seven checks sued on. Cropper closed his account with the plaintiff Bank June 15, 1912, and sold his business to Stein. June 17, 1912, Klor had in his possession the seven checks in question. On that day he endorsed them in blank and delivered them to Struve, Cropper's manager, and for them Struve gave Klor his check on the plaintiff Bank for \$641.62, the sum the seven checks amounted to. June 26, 1912, the check Struve gave to Klor was paid to Klor by the Bank. Struve, by accident or otherwise, failed to deposit with the Bank the seven checks he received from Cropper, and as a result his account was overdrawn about \$615. About six months after Cropper closed his bank account with the Bank, the seven checks sued on were found



in the drawer of a typewriter desk in the office of the Francis Cropper Company, the successor in business of Francis Cropper, of which Company Struve was the Manager. In September, 1915, Struve gave the checks sued on to the attorneys of the plaintiff Bank, and told them to give the checks to the Bank as security for their claim against him. ]

There is in the record a vast amount of evidence which we regard as irrelevant. The checks were given for rent by Cropper for premises which were occupied by him; they were delivered by Klor to Struve in exchange for Struve's check for the amount of such checks, and ~~Struve~~ <sup>Klor</sup> collected the Struve check, the checks sued on became the property of Struve, and he transferred them to the Bank as security for his debt to the Bank.

The only question in the case is: Has Cropper in any manner paid the seven checks in question? [There ~~is~~ <sup>was</sup> no evidence tending to show a direct payment of the checks by Cropper. His contention, ~~as plaintiff in error here, is~~ <sup>was</sup> that Klor was paid for the checks by Struve out of funds in his possession belonging to Cropper. This contention was supported at the trial only by the testimony of defendant's attorney in the cause in the Municipal Court and in this Court as to an admission by Struve, and his testimony was contradicted by Struve.] We think the trial Court properly found against the claim of plaintiff in error that Struve paid Klor out of the funds in his possession belonging to him, or that he in any manner paid the checks in suit, and properly gave judgment for the plaintiff, and the judgment is affirmed.

AFFIRMED.



In the absence of a copy of the letter to the effect of the  
 Francis Company, the following is a summary of  
 Francis Company, of which Company Francis was the owner.  
 In August, 1933, Francis gave the above sum to the  
 attorney of the Francis Company, and said that it was the  
 intention of the Francis Company to make a loan of \$100,000  
 to the Francis Company, and that the sum of \$100,000 was  
 to be used in the Francis Company. The Francis Company  
 gave him in the Francis Company a sum of \$100,000  
 which was used in the Francis Company. The Francis Company  
 for the Francis Company, but Francis Company was not  
 paid; and was delivered by him to the Francis Company  
 Francis Company for the Francis Company, and the Francis Company  
 collected the Francis Company, the Francis Company was  
 property of Francis, and the Francis Company was the  
 property of Francis, and the Francis Company was the

EDWIN C. BARNES, doing business  
as Edwin C. Barnes & Bros.,  
Appellee,

vs.

WILLIAM E. MARTIN, doing business  
as Martin & Martin,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

197 I.A. 298

MR. PRESIDING JUSTICE OSBURELY  
DELIVERED THE OPINION OF THE COURT.

✓ Plaintiff brought suit for the price of two  
"Edison Dictating Machines" with accessory appliances, which  
were sold and delivered to defendant pursuant to a written  
order. Upon trial by the court plaintiff had judgment for  
\$230.

The order upon which the appliances were delivered is explicit as to prices and terms; among other things it contained a provision that if the purchaser should for any reason be unable to use them they should be returned in ten days and full credit for them would be allowed. This order is dated July 22, 1914. The appliances were delivered and used by the defendant, and it was not until September 5th that defendant notified plaintiff that the machines were not wanted.

Defendant was obligated to pay for the appliances if he is bound by the terms of the order, but he says he is not bound for the reason that his cashier, McCallister, who signed the order had no authority to do so. [We hold that the evidence justified the conclusion of the trial court that McCallister did have such authority.] He had general charge of the office, buying supplies, signing checks, and employing and discharging some of the employees. During defendant's



WILLIAM C. BAKER, JR.,  
as Admin. E. Baker & Son,  
Appellee,

vs.

WILLIAM C. BAKER, JR.,  
as Admin. E. Baker & Son,  
Appellant.

1917 A. 208

THE COURT OF COMMONS

RECEIVED THE PETITION OF

WILLIAM C. BAKER, JR.,

Appellant, against  
WILLIAM C. BAKER, JR.,  
as Admin. E. Baker & Son,  
Appellee.

The Court of Commons  
has received the petition  
of WILLIAM C. BAKER, JR.,  
Appellant, against  
WILLIAM C. BAKER, JR.,  
as Admin. E. Baker & Son,  
Appellee.

The Court of Commons  
has received the petition  
of WILLIAM C. BAKER, JR.,  
Appellant, against  
WILLIAM C. BAKER, JR.,  
as Admin. E. Baker & Son,  
Appellee.

absence from the city he seems to have been the general manager of the business.

Defendant contemplated leaving the city, to be gone about six weeks, and before he left McCallister told him that he proposed to try a dictating machine in the office, and defendant consented to this. ✓

We have considered the variant testimony as to the verbal modification of the ten day clause in the order, and also as to the extension of the trial period, claimed by defendant, but are unable to agree that defendant has proven any modification of the terms upon which the appliances were sold.

The judgment is affirmed.

AFFIRMED.

whereas from the side he began to have back the forward

position of the shoulder.

Defendant continued until the end, to be

more about six years, and before he had completed this

and was no longer in any condition to see or

live, and defendant continued to work.

We have reviewed the various testimony as to

the verbal modification of the two claims in the order,

and also as to the payment of the first period, and

by Defendant, and the order has been found to be

given any modification of the order and will be

shown with words.

The judgment is affirmed.

REVEREND.

HERSCHEL M. BYALL, Admr. of  
the Estate of HARRY BOYD  
KING, deceased,

Appellee,

vs.

F. LANDON,

Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

197 I.A. 300

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against him for \$1,500 in a suit charging that the death of plaintiff's intestate, Harry Boyd King, was caused by defendant's negligence.

In our opinion the evidence shows that King by his own negligence contributed to the accident resulting in his death. This evidence in substance is as follows: Defendant, who is in the teaming and hauling business, at the time in question was engaged in hauling the materials of a dismantled police station through an alley which runs easterly into Market street, Chicago, between the building occupied by the Gault House, on the north, and the building of the Chicago Evening Post on the south. The alley is 10 feet 10 or 11 inches wide, and inclines upward from the rear of these buildings towards Market street, with "quite a grade." The materials loaded on the wagon were iron gratings and flat iron sheets about 10 feet long by 8 feet wide. They were loaded so as to extend an equal distance on each side of the wagon, which left a space of about 18 inches between the edge of the load and either wall of the alley. There is ample evidence that the iron was tightly tied down with

THE STATE OF NEW YORK  
COUNTY OF ALBANY

Applicant,

vs.

J. L. LAMONT,

Respondent.

1917 A. 300

IN SENATE, JANUARY 11, 1917.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

By this report the Commission has the honor to lay before the Senate a statement of the results of its investigation into the alleged frauds in the sale of land in the State of New York. The Commission was organized by the Legislature in 1914, and its first report was presented to the Senate in 1915. Since that time it has held numerous public hearings and has received many suggestions from the public. It has also conducted extensive investigations into the various alleged frauds, and has endeavored to ascertain the facts in each case. The results of these investigations are set forth in this report. The Commission has found that there have been many instances of fraud in the sale of land in the State of New York, and that the public has been greatly injured by these frauds. It has also found that the existing laws are inadequate to prevent such frauds, and that it is necessary to enact new laws to protect the public. The Commission has endeavored to identify the persons who have been guilty of such frauds, and has endeavored to recover the money which has been paid by the public. It has also endeavored to prevent such frauds in the future. The Commission has found that the most common method of fraud is the sale of land to the public by the State or by a private person who claims to be the owner of the land. The Commission has found that such sales are often made at a great loss to the public, and that the land is often sold to persons who are not qualified to own it. The Commission has also found that there have been many instances of fraud in the sale of land to the public by private persons who claim to be the owners of the land. The Commission has found that such sales are often made at a great loss to the public, and that the land is often sold to persons who are not qualified to own it. The Commission has endeavored to identify the persons who have been guilty of such frauds, and has endeavored to recover the money which has been paid by the public. It has also endeavored to prevent such frauds in the future. The Commission has found that the most common method of fraud is the sale of land to the public by the State or by a private person who claims to be the owner of the land. The Commission has found that such sales are often made at a great loss to the public, and that the land is often sold to persons who are not qualified to own it. The Commission has also found that there have been many instances of fraud in the sale of land to the public by private persons who claim to be the owners of the land. The Commission has found that such sales are often made at a great loss to the public, and that the land is often sold to persons who are not qualified to own it. The Commission has endeavored to identify the persons who have been guilty of such frauds, and has endeavored to recover the money which has been paid by the public. It has also endeavored to prevent such frauds in the future.



chains and ropes so that it could not slip.

The deceased, King, [hereinafter called plaintiff,] at this time was about 20 years old, and was an assistant cashier of the Post. In the early afternoon of April 23rd with a companion he came out of the rear of the Post building into the alley and walked towards Market street, passing the loaded wagon as it stood in the alley. After standing for a time in Market street they retraced their steps down the alley way. At this time the heavily loaded wagon was moving, with four horses pulling it up the slope towards Market street. Plaintiff continued walking towards the approaching wagon and attempted to pass in the narrow space between it and the wall of the Post building. Just as he was opposite the hind wheels a wheel struck a hole in the pavement, causing the wagon to skid towards the Post building, catching and crushing plaintiff against the wall. From the injuries thus received he died shortly thereafter. At the time of the accident the wagon was nearly out of the alley, and if plaintiff had waited only a few seconds he could have passed through the alley in safety. He must have seen and known that it was extremely dangerous to enter this narrow space; that the wagon with its projecting load, drawn by four horses, might suddenly swerve towards the side of the narrow alley. Indeed, this reasonably could be expected, considering the roughness of the pavement and the usual uneven traction of four horses pulling a heavy load up hill. By placing himself in this dangerous situation plaintiff failed to exercise due care and caution for his own safety, and this negligence directly contributed to the accident.

There also appears no evidence sustaining the allegations of the declaration of negligence on the part of the defendant, either as to the way the team and wagon were

Official and private in 1947, it was not until 1948.

The following is a summary of the evidence.

On 1/10/48, the first of the two letters was received.

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handled or as to the method of loading. ✓

As there can be no recovery the judgment is reversed without remanding the cause.

REVERSED.

handled or as to the order of loading.

in this case no report of the survey is yet

received from the survey.

(11/11/11)

FINDING OF FACT.

The court finds that the death of plaintiff's intestate, Harry Boyd King, was caused by the contributory negligence of the deceased, and that the defendant, F. Landon, was not guilty of the negligence charged in the declaration or any count thereof.



STATE OF TEXAS

The court finds that the State of Texas

intended, Harry Boyd, was caused by the negligence of the defendant, and that the defendant was not guilty of the negligence charged in the indictment as set forth therein.





ant was served and appeared by counsel. After hearing, a decree of divorce was entered finding that the court had jurisdiction and that complainant had sustained her charges by evidence, and ordering defendant to pay complainant \$1,000 in full of alimony, which was paid. No appeal was taken and the decree is still in force. Subsequently Charles Eckhardt married Anna Marley, the other claimant herein.

Under the laws of the Lodge Order a member had the right at any time to change his beneficiary, and after his marriage to Anna, Charles surrendered his original certificate, and a new certificate was issued in which Anna Eckhardt was named as beneficiary. The fund which is the subject matter of this litigation arises from the payment of this last certificate. ✓

We are informed by counsel and the record that the chancellor found that Anna Eckhardt was entitled to this fund, and we are of the opinion that this holding was proper.

Beulah Eckhardt, hereinafter called appellant, argues that the decree of divorce by the court of Tennessee is void, hence the marriage to Anna, hereinafter called appellee, is null and void, and appellee is not entitled to the fund as the wife of Charles Eckhardt, as she is described in the benefit certificate.

Can appellant now question the jurisdiction of the Tennessee court, which at her request and upon her testimony as to jurisdictional facts found that it had jurisdiction? We hold that she cannot, that she is estopped. Bledsoe v. Seaman, 77 Kan. 679; In re Matthew Ellis' Estate, 55 Minn. 401. Especially is this true when she has received the benefits of the litigation. Kile v. Town, 80 Ill., 208; Mallory v. Mallory, 160 Ill. App. 417; Whittaker v. Whittaker, 151 Ill. 266.





But, says counsel for appellant, she is not estopped unless she made some misrepresentation as to material facts which deceived the Tennessee court into finding it had jurisdiction; that she testified truthfully, but the court misconceived the law, and that Anna Marley should have known that upon the facts to which appellant testified the court was in error in its adjudication as to jurisdiction; hence appellant has been guilty of no fraud which caused harm to appellee.

This contention is unsound. (1) There is no basis for the assumption that on the facts the Tennessee court erroneously assumed jurisdiction. (2) As effecting estoppel, we see no difference between procuring a favorable adjudication through misrepresentation of facts or misrepresentation as to <sup>the</sup> law. (3) Appellee married and cohabited with Charles Eckhardt, believing in and relying upon the integrity of the decree of divorce. If it be void she has suffered harm; we doubt the protecting efficacy of any legal presumption that she possessed knowledge of the law superior to that of the Tennessee court.

We see no reason to disagree with the conclusion of the chancellor, and the decree is affirmed.

AFFIRMED.

and, also counsel for appellee, but it was not  
 taken into account in the representation as to material  
 facts which received the Tennessee court's attention. It was  
 jurisdiction; that the testimony, and the court  
 misapprehended the law, and that Appellant's error was  
 that upon the facts to which appellant testified the court  
 was in error in its application as to jurisdiction; hence  
 appellant has been failing to show that he caused harm to  
 appellee.

This contention is untenable. (1) There is no  
 basis for the assertion that on the facts the Tennessee court  
 erred in its jurisdiction. (2) As to the alleged  
 we see no difference between procedure in favorable jurisdiction  
 than through mere recitation of facts a representation  
 as to law. (3) Appellant's error and contention with Charles  
 Edwards, believing in and relying upon the integrity of the  
 decree of divorce. If it be void the law followed here; we  
 doubt the correctness of any legal proposition that  
 the Tennessee knowledge of the law superior to that of the  
 Tennessee court.

There is no reason to believe that the decision  
 of the appellate, and the decree is affirmed.

AFFIRMED.

197/309

72 - 21358

RUTH WHITNEY, by next friend,  
Appellee,

vs.

FRANK B. DERBY et al.,  
Appellants.

APPEAL FROM SUPERIOR COURT,  
COCH COUNTY.

197 I.A. 309

MR. JUDGE JUSTICE McDERMOTT  
DELIVERED THE OPINION OF THE COURT.

Ruth Whitney, plaintiff, was injured by a stone railing falling on her as she was playing on the front steps of a building where she lived, which building was owned by the defendants. She brought suit and had judgment. In her declaration she alleged that this stone railing was suffered by the defendants "to be loose, so that it was likely to fall over," and that "while plaintiff was about to enter said premises, in passing upon and along said steps in dangerous proximity of said stone slab or railing, without any fault or negligence on her part, by reason of the carelessness and negligence of the defendants, and each of them, aforesaid, the said stone slab or railing fell or tumbled and upon the said plaintiff."

We are compelled to reverse this judgment and grant the cause for a new trial for the following reasons: The verdict was contrary to the weight of the evidence. It is shown almost beyond contradiction that the stone did not fall without any fault of the plaintiff and solely because of the carelessness of the defendants; that the plaintiff, although warned of the danger at the time, "rocked" the stone up and forth and finally succeeded in pulling it over upon herself.



2

The injury received by plaintiff was not much more than scratches or abrasions on the leg, from which she quickly recovered. There was no evidence which would justify a verdict fixing the damages at \$1,250. Through the suggestion of the trial court plaintiff remitted down to \$650, but the amount of the verdict indicates plainly that the jury was moved to its verdict by prejudice and sympathy.

We are not satisfied to permit this judgment to stand; there should be another trial. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.





EMIL OTTERBECK et al.,  
Appellees,  
vs.  
EVANS LARSON,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

197 I.A. 310

MR. PRESIDING JUSTICE MCHURELY  
DELIVERED THE OPINION OF THE COURT.

This appeal brings in review the record in a proceeding in chancery, brought by the beneficiarics under a will against the trustee for an accounting.

✓ On August 24, 1908, Lauritz Mortensen died. By his will it was provided that after the payment of debts and funeral expenses \$1,500 should be paid to Evans Larson, appellant (hereinafter called defendant); that defendant should take possession of all the rest and residue of the estate and hold the same in trust for a period of five years, with power to rent, repair and sell, "and to do whatever else he deems best for the interest of said estate," compensation to be paid defendant for managing said estate at the rate of 3% at the end of each year on the fair cash value of said estate. He was not required to give bond. The will further provided that at the end of five years after the death of the testator said estate should be divided equally among Anna Marie Larson, wife of the defendant and niece of the testator, Lotta Nelson, a niece of the testator, Emil Otterbeck, a nephew, Edward Otterbeck, a brother, and Mathilda Otterbeck, wife of Edward. Defendant was appointed executor of the will without bond.

On May 4, 1911, the above named beneficiaries,

*[Faint handwritten notes at bottom]*

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

Proceedings in Chinese, by the author, 1954.

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It is requested that you advise the Bureau of the results of your investigation.

CONFIDENTIAL - SECURITY INFORMATION

1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people. The second is that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The third is that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The fourth is that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The fifth is that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The sixth is that the system is not a single one, but a multiple one, which is characterized by many different levels of analysis and many different perspectives. The seventh is that the system is not a simple one, but a complex one, which is characterized by many different factors and many different people. The eighth is that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The ninth is that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The tenth is that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The eleventh is that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The twelfth is that the system is not a single one, but a multiple one, which is characterized by many different levels of analysis and many different perspectives.

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Setting of five years, with power to extend (2001)

\* and  $\beta$  are calculated from the following equation:

— *Journal of the American Medical Association*, 1933, 101, 1033

The rate index at the end of 1967 was 100.

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Five years after the last issue of the Journal, the

THE UNIVERSITY OF CHICAGO LIBRARY

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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bond.

M. GOLDSTEIN,

Defendant in Error,

vs.

PAUL SETKA and ANNA  
SETKA,

Plaintiffs in Error.

Error to

Municipal Court  
of Chicago.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff M. Goldstein, on October 29, 1913, filed his statement of claim to recover commissions as a real estate broker. The defendants entered their appearance and demanded a jury trial. Subsequently plaintiff filed an amended statement of claim in which he alleged in substance that his claim was for commissions due him as a licensed real estate broker for procuring at defendant's request a purchaser, one S. Oliff, for certain real estate with improvements thereon owned by defendants and situated in the city of Chicago; that the property was sold by the defendants to said Oliff on June 23, 1913, for the sum of \$13,500; and that the amount due plaintiff as commissions was  $2\frac{1}{2}\%$  on said sum, or \$337.50. The defendants in their affidavit of merits alleged in substance that they did not employ plaintiff as a broker or otherwise with reference to said sale and that plaintiff did not act as agent for defendants but as agent for said Oliff in the transaction. The jury returned a verdict finding the issues against the defendants and assessing plaintiff's damages at \$337.50, upon which verdict the court entered the judgment here sought to be reversed.





The evidence shows that plaintiff was a duly licensed real estate broker, that defendants owned the property and that plaintiff carried on negotiations with Oliff with the knowledge of defendants which resulted in the sale.

It is contended that as the evidence fails to show that defendants formally employed plaintiff to negotiate a sale and as there is evidence showing that plaintiff was employed by the purchaser, the verdict and judgment cannot be sustained. We think there is ample evidence to warrant the verdict and judgment. It appears that as a result of the efforts and negotiations of plaintiff the parties were brought together and signed a written contract whereby defendants agreed to sell, and Cliff to buy, the property for \$14,000; that subsequently further negotiations were had which resulted in the price being reduced to \$13,500; that there was no special agreement between plaintiff and defendants as to the commissions to be received by plaintiff, but that those commissions were usually 2½% on the purchase price. We think the evidence is such that the employment of plaintiff by defendants to negotiate a sale of the property may be implied, and that while it appears that plaintiff was also acting as an agent for the purchaser the evidence discloses that defendants knew of that fact, and that no fraud was practiced upon defendants by plaintiff. "When a broker has presented to his principal a purchaser whom the principal is willing to and does accept, and they enter into a contract of sale, the broker's commissions are earned." (Fox v. Ryan, 240 Ill. 391, 397.)

And we do not think that the court in the rulings on evidence, or in the oral charge to the jury, committed any error prejudicial to the defendants as contended by counsel.

The evidence shows that plaintiff was a party  
licensed real estate broker, that defendant owned the prop-  
erty and that plaintiff acted as negotiator on behalf of  
with the knowledge of defendant which resulted in the sale.  
It is contended that as the evidence fails to show  
that defendant formally employed plaintiff to negotiate a  
sale and as there is evidence showing that plaintiff was  
employed by the defendant, the verdict and judgment should  
be sustained. The court in its opinion stated in support  
of the verdict and judgment. It appears that as a result of the  
efforts and negotiations of plaintiff the parties were brought  
together and signed a written contract whereby defendant  
agreed to sell and title to pay, the property for \$15,000;  
that subsequently further negotiations were had which resulted  
in the price being reduced to \$12,500; that there was an  
special agreement between plaintiff and defendant as to the  
commission to be received by plaintiff, but that those  
commissions were usually 5% on the purchase price. It is  
the evidence is such that the employment of plaintiff by  
defendant to negotiate a sale of the property may be implied,  
and that while it appears that plaintiff was also acting as  
an agent for the purchaser the evidence discloses that the  
defendant knew of that fact, and that no fraud was practiced  
upon defendant by plaintiff. "That a broker was appointed  
to his principal a purchaser from the principal is entitled  
to and to a receipt, and they enter into a contract of sale,  
the broker's commissions are earned." (Hoy v. Hoy, 240 Ill.  
421, 337.)

And we do not think that the court in the above case  
evidence, or in the case of the jury, committed any  
error.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

The judgment of the Judicial Board is affirmed.

APPEAL.

ALFRED D. WARD and  
THOMAS D. WARREN,  
Appellants,

vs.

JOHN M. GARTSIDE and  
ANNIE L. GARTSIDE,  
Appellees.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

197 I.A. 314

MR. PRESIDING JUSTICE McSURNELY  
DELIVERED THE OPINION OF THE COURT.

Complainants, Alfred D. Ward and Thomas D. Warren, filed their bill in chancery to foreclose a mortgage made by defendants. Defendants answered and Annie L. Gartside filed a cross-bill praying that the mortgage be declared void. The court decreed that the bill be dismissed for want of equity and that the prayer of the cross-bill be granted. Complainants by this appeal have brought the record before us for review.

Lawrence J. Haughton of Asheville, North Carolina, died owning several thousand acres of land in Jones County, North Carolina. By his will E. L. Haughton and W. M. Jones were appointed executors and were given "full power to sell my plantation in Jones County known as Ravenswood and to make a deed for the same." E. L. Haughton died before the occurrence of the transaction in question. Jones, as surviving executor, by an instrument in writing executed by him on August 28, 1909, gave to complainants, who resided in North Carolina, an option to purchase some 15,000 acres of land belonging to the Lawrence J. Haughton estate. (There is controversy as to the amount of land.) By its terms the executor promised that upon payment to him of \$100,000 on or before November 1, 1909, he would deliver a deed to the



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holders of the option; the option could be and was extended to January 1, 1910, under certain of its provisions. On November 16, 1909, this option was assigned by complainants to the defendant John M. Gartside, who in consideration for such assignment agreed to pay or to secure the payment of \$10,000, and to that end, on December 21, 1909, a mortgage was executed by defendants and delivered to complainants. It is this mortgage which complainants seek to foreclose.

Among other matters presented by defendants' answer and by the cross-bill, it was asserted that the mortgage was void for want of consideration, in that under the laws of North Carolina, Jones, the executor, had no power to give an option to purchase the lands of the Haughton estate. After hearing, the chancellor, being of the opinion that this defense was adequate, dismissed the bill and directed that the mortgage be released and complainants be enjoined from prosecuting any action on the mortgage or option contract. ✓

Had W. M. Jones, the surviving executor under the will of Lawrence J. Haughton, power to give this option contract, the assignment of which was the consideration for the mortgage? We hold that he had not. In so holding we are following the decision of the Supreme Court of North Carolina as expressed in its opinion in the case of Trogden v. Williams, 144 N. C. 192. In this case the holders brought suit to enforce the performance of a ninety day option on land given by executors who had power to sell. The court holds that the executors had no power to give an option, saying in its opinion that an option "is at least temporarily destructive of the power" to sell. "During the ninety days, if the option is valid, the power to sell is suspended and the executors have no right to accept an

holders of the option; and option could be sold and assigned  
as to January 1, 1911, under terms of the contract.

On November 16, 1909, this option was assigned by assignor  
to the defendant John W. Edwards, who in consideration for  
such assignment agreed to pay at or before the payment of  
\$10,000, and to that end, on January 11, 1910, a contract  
was executed by defendant and assignor to assignor.  
It is this contract which constitutes basis of testimony.

Some other matters presented by testimony  
show that of the contract, it was intended that the  
contract was with the intent of consideration, in that upon  
the date of John Edwards' death, the contract, had he

been to give an option to purchase the stock of the  
defendant's estate. After hearing, the majority, under the  
the opinion that this contract was intended, directed that  
will not direct that the contract be enforced and

enforcement be refused from proceeding any action on the  
contract on option contract.

And J. W. Edwards, the surviving executor under the  
will of master J. W. Edwards, agreed to give this option  
contract, the assignment of which was the contract between the  
the majority, to hold that he had not. In an opinion in  
the following the decision of the supreme court in Edwards  
is followed as expressed in the opinion in the case of Edwards

J. Williams, 122 N. J. 104. In this case the majority  
found that it was the intention of the majority to  
option as then given by majority and not power to sell.  
The court held that the majority had no power to give  
an option, which is the opinion that an option "is a  
local property, exclusive of the power" to sell. "When  
the party has, in the option to sell, the power to sell  
is exhausted and the execution of the option is exhausted"



offer to buy the land, however advantageous it may be."

This reasoning would not obtain in the case of an option given by the owner himself. Hence citations where options of the latter sort have been upheld are not in point.

It is contended that the decision on this point in the Trogden case is obiter dictum. We do not think so. In answer to complainants' suit for performance of the option contract the court replied that the option was given without power. Complainants then contended that even if this were so, by tendering the amount named in the option it ceased to be an option contract and became a contract of sale, and the court held that no such tender was made. What was said by the court upon the first point was upon the question squarely presented to it for decision, and the extended language in the opinion indicates that it was the deliberate conclusion of the entire court. In People v. Read, 233 Ill. 351, it is held that an expression of opinion upon a point deliberately passed upon by the court is not obiter dictum; and in Law v. Grossen, 156 Ill. 492, there is quoted with approval from Anderson's Law Dictionary the following: "An expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if a dictum at all is a judicial dictum, as distinguished from a mere obiter dictum, - i. e., an expression originating alone with the judge who writes the opinion, as an argument or illustration." It also should be noted that in vol. 10 L. R. A., N. S., page 867, is a foot note in which it is stated that "the few cases that have passed upon the matter hold, as does Trogden v. Williams, that an option under such circumstances is not binding." The decision of the Supreme Court

right to buy the land, however, is not in.

This agreement was not made in the case of the  
 action given by the court, and, in the case of the  
 action of the land, the court has not yet decided.  
 order.

It is suggested that the court should

in the present case is not in the present case.

In answer to the suggestion, the court has not yet

decided whether the court should give the court the right

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of North Carolina, on a contract made within the state between its citizens, touching land within the state, is controlling.

The option was not enforceable against Jones, executor; hence Cartside, to whom it was assigned, received nothing of value. It follows that the giving of the mortgage therefor was without consideration.

The decree of the Circuit Court was proper and is affirmed.

AFFIRMED.

of North Carolina, on a highway which the State  
 follows its course, following the line of the  
 in the State.

The State has not authorized any other  
 authority having jurisdiction, in order to be authorized, authorized  
 within of value. It follows that the State of the  
 authority having jurisdiction.

The State of the State has not  
 and is authorized.

State.

BERNARD MARCOLIS,  
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,  
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

197 I.A. 316

MR. PRESIDING JUSTICE MCGURRY

DELIVERED THE OPINION OF THE COURT.

✓ About 10 a. m. on March 30, 1912, plaintiff while driving a horse and wagon southward on State street was struck by a southbound street car belonging to defendant. He brought suit and had judgment for \$2,000.

Plaintiff's wagon had an enclosed top with doors on the front, sides and rear. He was a tobacco peddler and accustomed to driving in the streets of Chicago, and was familiar with the locality near 13th and State streets, where the accident happened. His story is that he drove into the southbound tracks, and after driving there for about four minutes the street car unexpectedly came rapidly from the north and struck his wagon as he was attempting to pull out of the tracks towards the west. Defendant's story is that as the car approached 13th street the gong was being rung; that plaintiff was then driving between the southbound track and the west curb of the street; that when plaintiff reached 13th street he suddenly turned eastward into the track in front of the car, then seeing the car he attempted to turn back but before he could do so the wagon was struck and upset; that the car's speed did not exceed 6 or 8 miles an hour, and that it stopped within a very few feet after the collision. Defendant claims that plaintiff was guilty of contributory negligence and that it was not guilty of negli-

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gence.

~~We~~ shall not narrate the variant testimony of the witnesses. We are strongly impressed by the claim of defendant that the verdict was against the weight of the evidence, but however this may be it was a close case and required instructions which should fairly present the conflicting issues.] The court refused defendant's request to give instruction No. 4, which is as follows:

"You are instructed that the crew of the car in question were not required to exercise the highest degree of care to avoid injuring the plaintiff on the occasion in question, but were only required to exercise ordinary care; and if you believe from the evidence in this case, under the instructions of the court, that as the car approached the place of the accident it was being operated with ordinary care, and that the motorman of the car in question, in the exercise of reasonable and ordinary care, did all he could to avoid the accident in question as soon as it was apparent or ascertainable to him, in the exercise of reasonable and ordinary care, that the wagon in question was upon the track, or getting upon or near the track into a position of danger, then the plaintiff cannot recover in this case." ✓

This is a stock instruction and has been given many times in cases of this sort; it is based on defendant's theory of the case, and should have been given. It is not covered by any other instruction, as claimed by plaintiff's counsel.

Instruction No. 14 was given at the request of plaintiff; it concerns plaintiff's interest in the verdict, and told the jury that his testimony should not be disregarded because of such interest. This instruction was proper, but the court refused defendant's request to give its instruction No. 9, which concerned the testimony of the employees of defendant and told the jury that their testimony should not be disregarded because of the fact of employment. Both instructions had to do with the personal interests in the case of the witnesses, and having given plaintiff's instruction it was error to refuse defendant's.

The evidence tended to show that the only in-





jury received by plaintiff was a sprained ankle, from which he soon recovered. The verdict of \$2,000 indicates that the jury was not moved by coolness and impartiality of judgment.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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MAUD EACUTT,  
Appellee,

vs.

ISAAC EACUTT,  
Appellant.

APPEAL FROM THE SUPERIOR COURT  
OF COOK COUNTY.

197 I.A. 334

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

✓ The appellee filed her bill for divorce against the appellant, alleging extreme and repeated cruelty and praying for divorce and alimony. The defendant was personally served, did not appear, and an order of default was entered for failure to appear July 8, 1914. July 22, the cause was heard and a decree of divorce entered and an order that defendant pay plaintiff \$75 per month alimony. July 31 defendant filed his motion to vacate the decree, set aside the default of defendant and give him leave to answer. The hearing of the motion was continued, and February 15, 1915, the motion was denied, and from that order this appeal is prosecuted.

In his affidavit in support of his motion he stated that the decree of divorce was entered during his absence from the State. On the hearing of the motion it was admitted that at the time of the hearing of the bill for divorce, defendant was in the court house and spoke to the witnesses. The ground on which defendant asked the Court to vacate the decree of divorce was that complainant had been guilty of adultery during the marriage. This defense was not set up by answer, and the decree will not be vacated to permit defendant to set up a defense to the bill in a matter not set up by answer. Elzas v. Elzas, 183 Ill. 132; Buswell v. Buswell, 146 Ia. 52. Aside from that rule,

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*The Journal of American Studies*, 40 (1976), 1, 1-18.

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the affidavits filed in support of the motion fail to show that the defendant could not have discovered the testimony by the use of reasonable diligence in time for the hearing.

Elzas v. Elzas, supra.

We think there was no abuse of discretion in denying defendant's motion, and the order of the Court appealed from is affirmed.

AFFIRMED.

the Affidavit filed in support of the motion (all) is made  
that the defendant could not have discovered the information  
by the use of reasonable diligence is also for the finding.

James v. [redacted]

We think James was in breach of fiduciary duty  
denying defendant's motion, and the order of the court ap-

pealed from is affirmed.

REVEREND

LOTTIE E. FISH,  
Appellee,  
vs.  
WILLIAM H. FISH,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

1915 I.A. 335

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

✓ This is an appeal by the defendant, William H. Fish, from a decretal order entered November 21, 1914, adjudging him guilty of contempt in failing to pay to complainant \$228, the amount of alimony decreed to her July 10, 1910, at the rate of \$12 per month from March, 1913. By a former order entered October 10, 1913, defendant was adjudged guilty of contempt in failing to pay the alimony decreed to complainant up to and including March, 1913. From that order he prosecuted a writ of error to this Court and the order was affirmed October 5, 1915, (Fish v. Fish, No. 20816). ✓ The facts and the contentions of counsel and our decision thereon sufficiently appear in the opinion filed October 5, and need not be here repeated. The only additional grounds of reversal urged are that, "the judgment merged in the bond filed which satisfied the debt," and that the writ of error issued in case No. 20816 having been made a supersedas by order of this Court, the appellee "is thereby estopped from any further proceedings against appellant as being contrary to public policy." Both of these contentions are without merit, and the order appealed from is affirmed for the reasons stated in the opinion in No. 20816.

ORDER AFFIRMED.

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1. The first of these is the fact that the  
2. Government has not been able to secure  
3. the necessary funds to carry out its  
4. policy of non-interference in the  
5. internal affairs of the country.  
6. This has been due to a number of  
7. factors, including the fact that the  
8. Government has not been able to secure  
9. the necessary funds to carry out its  
10. policy of non-interference in the  
11. internal affairs of the country.

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In re Estate of JOSEPH  
GORLEWICZ, deceased,  
On Appeal of MARY GORLEWICZ,  
Appellant,

vs.

HENRY A. FOWLER, Adm'r of  
the Estate of JOSEPH  
GORLEWICZ, deceased,  
Appellee.

APPEAL FROM CIRCUIT COURT

OF COON COUNTY.

197 I.A. 337

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The Probate Court entered a rule on the appellant here, Mary Gorlewicz, to show cause why she had not complied with an order of that Court directing her to turn over to the administrator of the Estate of Joseph Gorlewicz certain personal property and a saloon license, or \$2,000 received on a sale of the same. On the hearing a rule was entered directing her to pay over to the administrator \$2,000. From such order she appealed to the Circuit Court. On the hearing in that Court the following order was entered following certain findings:

"Therefore, it is considered by the Court that the appellant, Mary Gorlewicz, take nothing by her aforesaid action, and that the administrator of the estate of Joseph Gorlewicz go hence without day and do have and recover of and from the appellant, Mary Gorlewicz, the sum of two thousand dollars, together with his costs and charges in this behalf expended and have execution therefor."

[ Treating this bungling and underclerlike order as an order that she pay \$2,000 to the administrator of Joseph Gorlewicz, Mary Gorlewicz appealed to this Court.

There is very little evidence in the record. The bill of exceptions contains twenty-five pages of remarks by counsel and the presiding Judge, but no agreement between counsel as to facts is shown, and appellee has filed no brief. ]





Joseph Corlewicz died May 4, 1911, and had at the time of his death a dram shop license which expired October 31, 1911. The appellant carried on the dram shop after his death, and October 27, 1911, made application for a dram shop license for six months beginning November 1, and one was issued to her by the City of Chicago. February 13, 1912, she sold the license so issued to her for \$2,000. There is in the record no ordinance in relation to dram shop licenses. So far as appears from the record, the license which appellant sold in February, 1912, was her own license, in which the administrator of Joseph Corlewicz had no interest. ✓

The judgment of the Circuit Court is reversed and the cause is remanded to that Court with directions to enter an order discharging the rule entered by the Probate Court against appellant.

REVERSED AND REMANDED  
WITH DIRECTIONS.



FRANK H. JONES, Trustee, etc.,  
Appellant,

vs.

LOUIS W. PARKER et al.,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

197 I.A. 338

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat entered on a directed verdict of not guilty in an action for deceit brought by Jones, trustee in bankruptcy of the estate of Benozette Williams, and Charles Mackitchie against Parker and Dickason, surviving partners of the firm of Dorwin & Co., composed of the defendants and S. H. Dorwin. The only question we shall consider is whether the evidence shows any actionable misrepresentation by Dorwin & Co., relied on by Williams and Mackitchie, which was the inducing cause of a loss which they sustained. ✓ A certain railroad company was engaged in constructing a railroad over the Atchafalaya River in Louisiana. On each side of the river was a swamp through which an embankment three or four miles long had to be constructed to elevate the tracks. This embankment on the west side of the river extended from the high ground at engineer's station 829 to the west bank of the river, engineer's station 1054. The embankment on the east side extended from station 1059 at the east bank of the river east to station 1707, where it reached the high ground. ✓ October 9, 1907, Dorwin & Co. entered into a contract in writing with the railroad company with reference to the construction of the embankments. It provided that Dorwin & Co. should, at the price of thirty cents per cubic yard, complete the work on the west side of the river in one hundred and twenty days,





MARY BERND,

Appellee,

vs.

CITY OF CHICAGO,

Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment for \$1875 recovered by the plaintiff against the City of Chicago for personal injuries alleged to have been sustained by her by reason of the negligence of the defendant in failing to keep a certain sidewalk and the space between the sidewalk and the curb in a proper condition and repair. Plaintiff and her son were walking north on Sheffield avenue, plaintiff on the left or west side of her son, when she suddenly fell. The only witnesses who had any personal knowledge of the accident were plaintiff and her son, then about sixteen years old. She was asked where she walked, and answered, "I can't tell, was it really on the sidewalk or next to the sidewalk - it was on the sidewalk I fell because it was like the sidewalk, just as straight as the sidewalk, as even." She further testified in answer to the question of her own counsel - "Q. Which part of the sidewalk were you walking on?" "A. On the outside, the outer edge." She further testified that her foot caught against something and she fell; that she did not know what her foot caught against. Her son testified that he was walking on the east side of his mother; that there were some people west of her; that he was on the sidewalk and so far as he knew his mother was on the sidewalk; that he noticed that there was a pipe or brick or something protruding from the ground; that he went back two days later and saw a mush-



room pipe west of the sidewalk; that plaintiff fell in front of number 2249 Sheffield avenue; that there was snow here and there and a little ice on the street here and there. He further testified that 2249 was a double house. The evidence shows no defect in the sidewalk, and that west of and near the sidewalk was an iron pipe, a mushroom-shaped pipe or cover, intended for use as a shut-off box for water pipes leading to the adjoining house.

The first count of the declaration alleged that plaintiff fell as she was walking on the sidewalk because of its dangerous condition; the second, that plaintiff was passing upon said sidewalk and fell because of the dangerous condition of the sidewalk and space used by pedestrians; the third, that the defendant had negligently used and permitted a certain public street, viz, Sheffield avenue, to be out of repair with dangerous pieces of iron pipe extending six inches above the ground, and that as plaintiff was passing along and upon said sidewalk and space she fell because of such dangerous condition of the sidewalk and street and the space between; the fourth count alleged that defendant had negligently kept a certain sidewalk and space in a dangerous condition with pipes extending to a dangerous height and with a dangerous depression, and while plaintiff was passing along and upon said sidewalk, street and space, she struck against said pipe and obstruction and into said depression and fell, etc. ✓

The only defect which the evidence tends to show, if indeed that can be considered a defect, is that in the space between the sidewalk and the curb there was this iron shut-off box, and if it be conceded that this was a defect, still the evidence fails to prove the guilt of the defendant, because it fails to show that she struck her foot against

then left west of the sidewalk; the sidewalk was not  
 of metal but asphalt (and there was some more and  
 there was a little less and there was more and there was  
 then testified that this was a single piece, and that  
 there was a defect in the sidewalk, and that west of the defect  
 the sidewalk was an iron pipe, a wooden-plank pipe or  
 better, intended for use as a walk-off but the defect  
 leading to the adjacent piece.

The first piece of the sidewalk which was  
 testified to was not walking on the sidewalk because of  
 its irregular condition, and second, that condition was caused  
 by upon said sidewalk and fell because of the irregular con-  
 dition of the sidewalk and again used by pedestrians; the  
 third, that the defendant had negligently used and placed  
 a certain (certain) piece, viz., (certain) piece, of the out of  
 repair with damage as placed of the sidewalk and caused  
 above the ground, and that the sidewalk was caused which and  
 upon said sidewalk and space and that caused of such damage,  
 one condition of the sidewalk and street and the same damage,  
 the fourth piece alleged that defendant had negligently  
 a certain sidewalk and again is a dangerous condition and  
 (piece) according to a dangerous piece and with a dangerous con-  
 dition, and with (certain) and (certain) about and with said  
 sidewalk, street and space, the (certain) sidewalk with (certain)  
 condition and this was (certain) and (certain).

The only defect which the witness knew of was  
 it (certain) that can be considered a defect. It was to him  
 space between the sidewalk and the curb (certain) and (certain)  
 (certain) for, and it is to be considered that this was a defect,  
 said the witness (certain) to (certain) the (certain)  
 because it (certain) to (certain) and (certain) and (certain) (certain)



such shut-off box. It is clear from her testimony that she did not know what caused her fall. There was snow and ice on the sidewalk here and there and the night was cold. Her son did not claim that he knew that night the cause of his mother's fall, but when he went back two days later and saw the shut-off box in the space between the sidewalk and the curb, he jumped to the conclusion that she struck her foot against the shut-off box and thereby her fall was caused. He did not notice that night where she fell further than that it was in front of 2249 Sheffield avenue - a double house and therefore presumably from 40 to 50 feet wide.

A careful review of the evidence has led us to the conclusion that the evidence in the record fails to show that plaintiff's injuries were caused by the negligence of the defendant, and the judgment will therefore be reversed.

REVERSED.

(Over.)



which would not be. It is clear from the foregoing that the  
 did not know what was going on. The fact that the  
 on the evidence before the court and the state was clear. The  
 non in the state that he knew that about the course of his  
 subject's fall. But when he went back two days later and the  
 the subject was in the house before the accident and the  
 state, he learned in the conclusion that the victim was lost  
 against the subject's son and during the fall was damaged.  
 he did not notice that other events had taken place. The  
 that it was in front of the subject's house - a house  
 house and therefore presumably from the 25 feet high.  
 a careful review of the evidence has led me  
 to the conclusion that the evidence in the record fails  
 to show that subject's intention was to cause the death  
 of the defendant, and the defendant's intention  
 be reversed.

REVEREND.

(over)

259 - 21344

## FINDING OF FACT.

The Court from the evidence in the record finds as a fact that the evidence fails to show that plaintiff's injuries, for which she sued and recovered, were caused by the negligence of defendant, the City of Chicago.

and - 1934  
Division of Labor.

The Court took the evidence in the record from  
as a fact that the evidence fails to show that  
injurious, but which was found and removed, was caused by  
the negligence of defendant, the City of Chicago.

559 - 21344

MARY DEED.

Appellee,

vs.

CITY OF CHICAGO,

Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

188 I.A. 346

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment for \$1875 recovered by the plaintiff against the City of Chicago for personal injuries alleged to have been sustained by her by reason of the negligence of the defendant in failing to keep a certain sidewalk and the space between the sidewalk and the curb in a proper condition and repair. Plaintiff and her son were walking north on Sheffield Avenue, plaintiff on the left or west side of her son, when she suddenly fell. The only witnesses who had any personal knowledge of the accident were plaintiff and her son, then about sixteen years old. She was asked where she walked, and answered, "I can't tell, was it really on the sidewalk or next to the sidewalk - it was on the sidewalk I fell because it was like the sidewalk, just as straight as the sidewalk, as even." She further testified in answer to the question of her own counsel - "Q. Which part of the sidewalk were you walking on?" "A. On the outside, the outer edge." She further testified that her foot caught against something and she fell; that she did not know what her foot caught against. Her son testified that he was walking on the east side of his mother; that there were some people west of her; that he was on the sidewalk and so far as he knew his mother was on the sidewalk; that he noticed that there was a pipe or brick or something protruding from the ground; that he went back two days later and saw a dash-





iron pipe west of the sidewalk; that plaintiff fell in front of number 2249 Sheffield avenue; that there was snow here and there and a little ice on the street here and there. He further testified that 2249 was a double house. The evidence shows no defect in the sidewalk, and that west of and near the sidewalk was an iron pipe, a mushroom-shaped pipe or cover, intended for use as a shut-off box for water pipes leading to the adjoining house.

The first count of the declaration alleged that plaintiff fell as she was walking on the sidewalk because of its dangerous condition; the second, that plaintiff was passing upon said sidewalk and fell because of the dangerous condition of the sidewalk and space used by pedestrians; the third, that the defendant had negligently used and permitted a certain public street, viz, Sheffield avenue, to be out of repair with dangerous pieces of iron pipe extending six inches above the ground, and that as plaintiff was passing along and upon said sidewalk and space she fell because of such dangerous condition of the sidewalk and street and the space between; the fourth count alleged that defendant had negligently kept a certain sidewalk and space in a dangerous condition with pipes extending to a dangerous height and with a dangerous depression, and while plaintiff was passing along and upon said sidewalk, street and space, she struck against said pipe and obstruction and into said depression and fell, etc.

The only defect which the evidence tends to show, if indeed that can be considered a defect, is that in the space between the sidewalk and the curb there was this iron shut-off box, and if it be conceded that this was a defect, still the evidence fails to prove the guilt of the defendant, because it fails to show that she struck her foot against



such shut-off box. It is clear from her testimony that she did not know what caused her fall. There was snow and ice on the sidewalk here and there and the night was cold. Her son did not claim that he knew that night the cause of his mother's fall, but when he went back two days later and saw the shut-off box in the space between the sidewalk and the curb, he jumped to the conclusion that she struck her foot against the shut-off box and thereby her fall was caused. He did not notice that night where she fell further than that it was in front of 3249 Sheffield Avenue - a double house and therefore presumably from 40 to 50 feet wide.

A careful review of the evidence has led us to the conclusion that the evidence in the record fails to show that plaintiff's injuries were caused by the negligence of the defendant, and the judgment will therefore be reversed.

REVERSED.

(Over.)



FINDING OF FACT.

The Court from the evidence in the record finds as a fact that the evidence fails to show that plaintiff's injuries, for which she sued and recovered, were caused by the negligence of defendant, the City of Chicago.





E. F. KEBBLER, doing business as  
E. F. Keebler & Co.,  
Appellant,

VS.

JOHN F. DEVINE, Adm'r., etc., of  
the Estate of LUCY F. ALEXANDER,  
deceased,  
Appellee.

APPEAL FROM SUPERIOR  
COURT OF COCK COUNTY.

197 I.A. 353

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment of nil capiat rendered in an action brought by plaintiff in error as plaintiff against Mrs. Alexander, to recover commissions alleged to be due from her for negotiating a lease of certain real estate in Chicago owned by her and the sale of the buildings on the demised premises. Mrs. Alexander died pending the suit, and her administrator was made defendant.

✓ Plaintiff was a real estate broker in Chicago, and Mrs. Alexander resided at Spring Station, Kentucky. Before 1907 plaintiff had negotiated leases for David Laver of Chicago and been paid commissions therefor by him, and J. Alexander Waller had acted as agent for Mrs. Alexander in relation to the demised premises, but had no authority from her to lease the same. In May, 1907, plaintiff took McGinnis to Waller as a prospective tenant or purchaser, but as nothing came of the negotiations they may be disregarded. May 31, 1907, plaintiff wrote to Mrs. Alexander. The letter is not in the record, but from the answer dated June 3, 1907, it is apparent that it related to the leasing of the real estate in question. How plaintiff came to write to Mrs. Alexander is a controverted question. Gilbert F. Keebler, the son and

J. F. KILLIAN, Spring Branch, Texas  
J. F. KILLIAN & Co.,  
Applicant.

vs.

JOHN F. KILLIAN, Applicant,  
the Estate of J. F. KILLIAN,  
Respondent.

Applicant.

1971-1-13

RE. JUDICIAL ORDER CONFIRMING THE ORDER OF THE COURT.

This report is presented to the Court as follows:

of all cases retained in an action brought by the Court in  
after an affidavit signed by the Applicant, to remove the  
allegation alleged to be true from the Court's jurisdiction  
of certain real estate in which the Court has an interest  
of the claims on the basis of the Court's order. The Applicant  
also pending the case, and the Applicant's and the Court's  
and.

Applicant and a real estate broker in Chicago  
and Mrs. Alexander visited at Springfield, Illinois, and  
fore 1907 Plaintiff had received money for said house and  
Chicago and been paid commission therefor by said house.  
Alexander said that he was the real Applicant to the  
tion to the real estate business, but had no interest in the  
to lose the same. In May, 1907, Plaintiff was advised  
to either as a prospective tenant or otherwise, but he failed  
case of the real estate that was being sold. The house was  
1907, Plaintiff wrote to Mrs. Alexander. The house was  
in the house, but from the house since June 1, 1907, it  
is apparent that it related to the house of the real estate  
in question. Now Plaintiff came to write to Mrs. Alexander

an employee of plaintiff, testified that plaintiff wrote to Mrs. Alexander at the suggestion of Waller, but Waller denied that he made any such suggestion. In the letter of June 3, Mrs. Alexander stated the terms on which she was willing to lease the real estate for thirty or ninety-nine years. One of the conditions stated was that the tenant "should give a bond to guarantee the lease." The rentals named by Mrs. Alexander in her letter of June 3 were, for a thirty year lease from twenty to twenty-eight thousand dollars per year and fifteen thousand dollars cash for the buildings then on the premises; and for a ninety-nine year lease, twenty to twenty-five thousand dollars per year and fifteen thousand dollars cash for the buildings. A few days later Gilbert F. Keebler went to the residence of Mrs. Alexander at Spring Station, Kentucky, showed her a copy of her letter of June 3 and told her that he had a proposition to submit to her for the lease of the property. In fact, Keebler was sent to Mrs. Alexander by David Moyer, who paid the expenses of his trip there, but this fact Keebler concealed from Mrs. Alexander and did not disclose the name of the person or corporation who proposed to lease the property, but told her that the individual back of the proposition did not want the name known, and for that reason the Western Trust & Savings Bank would guarantee that his proposition was bona fide. She asked him what his commission would be, and he told her. He remained at her residence a week and communicated with David Moyer by long distance telephone every day. A week after his return to Chicago, Dr. Alexander, the son of Mrs. Alexander, came to Chicago, and Gilbert Keebler and David Moyer met him at Mr. Loesch's office. There is some conflict in the testimony as to what was said at this meeting, but from the evidence the jury might properly find that the Co-operative Mercantile





Company, a corporation with a capital of only five thousand dollars, was mentioned as the proposed lessee; that Alexander said the proposed lessee was not satisfactory, that they would have to give further security; that the Alexanders wanted \$100,000 security put up on the Western Trust & Savings Bank in the lease, or its equivalent; that Mayer said: "I hold my commissions sacred to me, but I cannot ask my client to agree to any such terms," and that Alexander then said: "Mr. Mayer, if that is the case, the deal is off."

Dr. Alexander wrote appellant July 1, stating that they knew nothing about the corporation; that when the younger Keebler was in Kentucky he emphasized the point that the Western Trust & Savings Bank would be a party to the lease and add greatly to its security. In the letter the terms which Mrs. Alexander demanded were stated. One was that the Western Trust & Savings Bank would be a party to the lease, or a substantial increase in the security by bond or equivalent. The meeting in Mr. Loesch's office was on July 12. From that date no communication of any kind passed between the Keeblers or either of them and the Alexanders or either of them until after January 23, 1908, at which time the property was leased by Mrs. Alexander to David Mayer for twenty years.

From the evidence the jury might properly find that plaintiff, by his son and employee, was in June, 1907, secretly acting as the agent of David Mayer and endeavoring to secure a lease of Mrs. Alexander's property for the Co-operative Mercantile Company, a corporation, which David Mayer at the meeting in Mr. Loesch's office called "my client." ✓

One who attempts to act as agent for both parties without disclosing the fact to his principals, is precluded from recovering commissions for such services. David Mayer



was so connected with and interested in the Co-operative Mercantile Company that he must be regarded as standing in the relation of a principal, and that plaintiff, by permitting his son and employee, to receive from Mayer the expenses of his trip to Kentucky to visit Mrs. Alexander, is precluded from recovering compensation for his services.

Young v. Trainor, 158 Ill. 428;

Warrick v. Smith, 137 id. 504;

Boyd v. Dillingham, 33 Ill. App. 266.

Mrs. Alexander did not list her property with plaintiff. Gilbert F. Keebler testified that he discussed the proposition of leasing the real estate in question with David Mayer four or five times before he went to Kentucky and heard it discussed by plaintiff and Mr. Mayer several times; that up to that time neither witness nor his father had ever met Mrs. Alexander; that before witness went to Kentucky, David Mayer said he liked the property, would like to lease it on certain conditions, and authorized witness to make certain propositions if he would go to Kentucky; that Mayer was the first one to suggest that witness go to Kentucky. He testified in a general way that plaintiff represented Mrs. Alexander when he went to Kentucky, but he stated no facts tending to show that she ever employed him or ever knew there was such a man until she received the letter from him of May 31. The most favorable view that can be taken of the evidence is that plaintiff opened the negotiations with Mrs. Alexander and was employed to negotiate a lease on the terms stated by her for either thirty or ninety-nine years; that nothing came of such negotiations, and that six months afterward Mayer secured a lease of the premises for twenty years.

We also think that from the evidence the jury





might properly find that the evidence failed to show that plaintiff was the procuring cause of the lease to David Mayer. As either finding of fact which the jury might properly make and, in support of the judgment, must be presumed to have made, is sufficient for the affirmance of the judgment, it is unnecessary to discuss other questions argued by counsel in their briefs, and the judgment is affirmed.

AFFIRMED.



might properly find that the witness failed to show that  
 himself was the person who was the cause of the loss of the  
 paper, as shown by the finding of fact which the jury made.  
 properly made and, in support of the judgment, that the  
 need to have made, is sufficient for the purpose of the  
 judgment, it is unnecessary to discuss other questions  
 raised by counsel in their briefs, and the judgment is  
 affirmed.

ORDERED.

MARSHALL STEEDMAN,  
Appellee,

vs.

CHICAGO MUSICAL COLLEGE,  
a corp.,

Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

197 I.A. 356

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

✓ This record brings in review the action of the Court in permitting plaintiff to file an amended declaration and an amended affidavit of claim after defendant had filed a plea of the general issue and after the same were filed striking out defendant's plea, ordering that the default of defendant be entered and entering judgment against it for \$5831.50. The order giving plaintiff leave to file an amended declaration and an amended affidavit of claim was entered November 2, 1914. The amended declaration and amended affidavit of claim were filed the same day. The order provides that defendant's "plea now on file shall stand to said amended declaration, to which latter plaintiff objects and excepts." November 25 defendant's plea was stricken out, its default taken and judgment entered against defendant. The bill of exceptions shows that defendant by its counsel objected to plaintiff's motion for leave to amend, but its objection was overruled and defendant excepted; that defendant also excepted to the judgment and prayed an appeal, which was allowed on defendant filing a bond, etc. The record shows no motion of defendant for leave to file an affidavit of merits. ✓

We think the case of Spradling v. Russell, 100 Ill. 522, controls the decision in this case. In that case the Court said, p. 524:

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There is no evidence of any other persons being present at the time of the shooting.

"A majority of this court hold that the circuit court has the power, under the statute, at any time before final judgment, to amend the papers constituting the foundation on which a plaintiff claims judgment, and that this, in a proper case, may be done by permitting an affidavit of claim to be filed, even after a plea has been filed. The bill of exceptions does not purport to show what cause was shown in support of the motion for leave to file such an affidavit in this case. It would doubtless be an improvident exercise of discretion in a court to allow an affidavit of claim to be filed at a stage of the case so late as here shown, without good cause brought to the knowledge of the court in support of the motion. This record fails to show that such cause was not shown. Unless the contrary is affirmatively shown, we must assume that such cause was shown, and that the circuit court acted properly. After the affidavit of claim was properly on file, the plea of Spradling, unsupported by an affidavit of merits, was under our statute no sufficient bar to the action, and it was entirely proper to strike the same from the files."

See, also, *Cramer v. Commercial Men's Association*, 260 Ill., 521.

The record is free from error and the judgment is affirmed.

AFFIRMED.





PEOPLE OF THE STATE OF ILLINOIS  
for the use of THE STATE BOARD  
OF HEALTH,

Defendants in Error,

vs.

JOHN BROD, Sr.,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 358

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

✓ This is an action of debt brought by the People of the State of Illinois for the use of the State Board of Health against John Brod, Sr., to recover the penalty for practicing medicine without a license from the State Board of Health imposed by Section 9 of the Act entitled "An Act to Regulate the Practice of Medicine in the State of Illinois and to Repeal an Act therein named," in force July 1, 1899 (Laws of 1899, p. 273). <sup>2147877</sup> The statement of claim alleges a former conviction for the same offense, and because thereof claims the penalty of \$200.

The appeal was taken in the first instance to the Supreme Court and that Court, holding that no constitutional question was involved, transferred the case to this Court. This disposes of the question as to the constitutionality of the Act argued in the brief of plaintiff in error.

Plaintiff in error further contends that if the Act is valid, it does not apply to him because he was practicing medicine when the Act took effect. ✓ This contention is disposed of by People v. Langdon, 219 Ill., 189.

We find nothing improper or erroneous in the rulings of the Court on questions of evidence.

From the evidence the jury might properly find

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that the defendant practiced medicine without a license, and the verdict, therefore, cannot be held not sustained by the evidence.

The contention of plaintiff in error that the judgment is improper because it provides that the defendant shall be imprisoned until the amount of the judgment and costs shall be paid, etc., and that such imprisonment is not warranted by the Constitution, is without merit. In Kennedy v. People, 122 Ill. 649, it was held that the prohibition of the Constitution against imprisonment, "does not extend to actions for torts nor to fines or penalties arising from a violation of the penal laws of the State."

The record is, in our opinion, free from error and the judgment is affirmed.

AFFIRMED.



CHARLES F. THURN, doing business  
as JOHN L. THURN & CO.,  
Appellee,

vs.

BERTHA C. SCHWARTZ, Administratrix,  
etc., et al., Defendants,

On Appeal of MARIE BADE and BERTHA  
C. SCHWARTZ, Administratrix of the  
Estate of GUSTAV BADE, Deceased,  
Appellants.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

197 I.A. 359

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

✓ On July 23, 1910, a judgment for \$573.21 was  
confessed and entered against Marie Bade and Gustav Bade in  
favor of plaintiff in the Superior Court. Gustav Bade,  
since entry of judgment, died, and on March 20, 1914, Marie  
Bade, his co-defendant, and Bertha C. Schwartz as adminis-  
tratrix of the estate of Gustav Bade, deceased, moved the  
Superior Court to vacate the judgment and for leave to  
plead. This motion was allowed. A trial was had before  
court and jury, which resulted in a verdict finding the  
issues for the plaintiff. A motion for a new trial being  
denied, the judgment entered was not a new judgment, but  
it was ordered that the judgment theretofore rendered  
July 13, 1910, stand in full force and effect and that  
plaintiff have execution upon said judgment and for costs. ✓

In this state of the record, notwithstanding  
a jury has passed upon the merits and found them to be  
with plaintiff, and although we are in accord with the  
finding of the jury both on fact and law, we are concerned  
only with the judgment entered by confession.

The laches attributable to appellants in  
waiting nearly four years before moving to vacate the  
judgment and to be let in to defend, is an effectual



CHAS. E. BROWN, JR., 1940  
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1940-1941

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CHAS. E. BROWN, JR., 1940  
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1940-1941

CHAS. E. BROWN, JR., 1940  
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barrier to the granting of such motion. The learned trial Judge erred in allowing, at that time, a defense to be made and the judgment to be suspended pending a trial on the merits.

As held in Barrett v. Queen City Cycle Co., 179 Ill. 68, diligence and merit must both appear to invoke the discretion of the court to open a judgment and let in a defense. Here no attention was given to the judgment by any party in interest until an attempt to sell real estate after the death of one of the defendants disclosed the fact that a sale could not be negotiated until the lien which the law imposed in virtue of the judgment was removed. Even where the affidavits disclose a meritorious defense and diligence is lacking, a motion to stay the operation of the judgment and for leave to defend will be denied. Schultz v. Weiselbar, 144 Ill. 26. In Austin v. Lott, 28 Ill. 519, it was held that a motion to set aside a judgment by confession made after the lapse of four terms of court came too late.

The judgment of the Superior Court is affirmed.

AFFIRMED.



RICHARD A. HALE,  
Appellant,

vs.

CLARA HALE,  
Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

197 I.A. 361

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

✓ Complainant filed in the Circuit Court a bill against his wife, the defendant, for a divorce a vinculo matrimonii and charged her with having committed adultery with one Clinton Vail on the 15th day of September, 1911, and on the 24th day of March, 1913, and the place of the adulterous intercourse was alleged to be the City of Chicago, and he also charged generally, but not specifically, other adulterous acts with Vail.

The answer of the defendant denies categorically the two acts of adultery specifically charged and also denies that she committed adultery at any other time or times with Vail. It is likewise charged in the bill and admitted in the answer that one child was born as the fruit of the union between the parties, a daughter, Frances Hale, who was between six and seven years of age at the time of the filing of the bill. A replication was filed to the answer and the cause was tried before the Court on the pleadings thus formed. The Chancellor, after hearing all of the evidence, dismissed the bill for want of equity, finding defendant "not guilty of the matters and things charged against her" in the bill. ✓

The record before us presents for our determination questions of fact. While the record is somewhat voluminous, its essence is encompassed within somewhat narrow limits. No good purpose can be subserved by here reciting the crimina-





tions and recriminations indulged in upon the trial by this unhappily wedded and mismated pair. The parties themselves need no enlightenment concerning the facts, and others are not concerned about them. In this opinion we shall therefore confine our observations to the controlling and ultimate facts.

The law casts upon the complainant the burden of proving by a preponderance of the evidence, at least one charge of adultery, uncondoned, made in his bill, as a condition precedent to the granting of a decree of divorce on that ground.

The learned Chancellor, after a patient and somewhat protracted hearing, concluded that complainant had failed to sustain by a preponderance of the evidence any of the charges of adultery made by him against his wife. We have carefully read and weighed all the evidence in the record and after doing so and upon mature consideration are unable to disagree with the conclusions reached by the Chancellor. We would not be warranted in disturbing such findings of fact unless we could say that they were palpably and clearly contrary to the weight of the evidence.

We are not, and cannot be, in the advantageous position of the Chancellor. He saw the witnesses and observed their manner and appearance upon the witness stand - privileges denied us. He was therefore the better able to determine the weight to be accorded to the evidence of each witness. Their fairness and candor, their prejudice and feeling, or the reverse if such existed, were apparent to him. Of these factors we are unable to judge, except as contradictory or unreasonable testimony, if any, found in the record, may betray the unreliability of a witness.



The credibility of the witnesses and the weight to be given their testimony are so largely matters resting with the Chancellor hearing the case that his conclusions upon the facts will not be disturbed unless the record discloses that such conclusions are manifestly against the preponderating force of the evidence.

The legal presumption of the rectitude of defendant and her innocence of the charge of adultery, imposed upon complainant the necessity of proving such charge by a preponderance of the evidence. No presumptions of guilt can be indulged which do not rest for their support upon direct proof. As said in Whitlock v. Whitlock, 268 Ill. 218, referring to a charge of adultery - "When such a charge is made, it involves the character of both parties to the offense, and the character of the woman to whom it is of priceless value. She should not be found guilty on evidence which may as well import innocence as guilt." The divorced wife of Vail was put upon the witness stand by complainant; she proved an unsatisfactory witness for him; yet no inferences against defendant can be indulged that are not fairly deducible from facts found in the testimony of this witness. Because she failed to remember matters about which it would seem incredible that she could have no recollection, does not justify reading into her testimony that which counsel surmises she could in candor have testified about. The rulings of the Chancellor on such testimony were correct.

✓ Complainant's proof to sustain his charges of adultery are based upon the alleged confession of his wife made on the 16th day of September, 1911, and as to the adultery charged to have been committed on March 24, 1913, on the testimony of two detectives. The alleged confession





defendant denies in toto, [so that, treating each of the parties as equally worthy or unworthy of belief, there is no preponderating evidence as to such confession. But, on the other hand, the facts which] the record abundantly substantiates [—] that the parties continued to live in the marital relation from that time until the middle of May, 1912, that complainant did not finally leave his wife until August 7, 1912, and [the further fact that] letters written by him to her during that time were couched in affectionate terms, without any reference to defendant's having fallen from marital rectitude [—] are facts which, in our opinion, effectually condoned the alleged confessed adultery if it had been committed.]

In avoidance of these matters, complainant put in evidence a letter dated August 7, 1912, written to him by the parents of defendant, which letter was prepared by a lawyer for complainant and which reads as follows:

"I regret that circumstances make it necessary or proper, in your opinion, for you to leave our house and leave Clara with us; but, knowing as I do that you and she have not lived together as husband and wife since you made the painful discovery, and knowing, as I have hitherto informed you, from what she has told me, that you have statutory grounds for divorce, I can not urge or expect you to stay any longer with us, if your judgment and feelings prompt you not to do so. I beg of you, however, that if you seek a divorce you will spare her feelings and ours as much as you possibly can."

Complainant also introduced a letter in evidence written by defendant to complainant's mother in October, 1911. ✓ There is nothing in these letters, standing by themselves and unexplained, which is not just as compatible with innocence as with guilt. The letter of defendant's parents is in the nature of a self-serving document, it being procured by complainant as the foundation for an excuse for leaving the house of his wife's parents, with whom he was residing; he testified himself that he left the





house within a day or two after the receipt of that letter and has since lived under a separate roof.

There is nothing in the letter of defendant to complainant's mother which can by any reasonable interpretation be said to be a confession of any adulterous act with Clinton Vail. In the letter written to complainant by defendant's parents, the words "and knowing, as I have hitherto informed you, from what she has told me, that you have statutory grounds for divorce," are not susceptible of the interpretation that defendant had committed adultery with Clinton Vail. Furthermore, this letter was not connected with any evidence of any confession made by defendant to her parents of any act of adultery with Clinton Vail. On the contrary, both she and her parents denied that any such confession was made, and there are no other facts or circumstances appearing in the record which would permit of a finding that any such confession was made by defendant or that any act of adultery was committed by her with Clinton Vail. The words "statutory grounds for divorce," cannot be construed as meaning adultery. All grounds for divorce in this State are statutory. The letter of defendant's parents was prepared by a lawyer of many years standing at this bar and of good repute both for legal learning and integrity. If this lawyer intended these parents to write to complainant a confession made by their daughter of adultery with Vail, we will assume that in all honesty he would have so stated in plain and understandable terms, and would not have resorted to terms which might just as well import desertion, drunkenness, cruelty or impotency as adultery. We cannot assume that this lawyer would have tricked these parents into stigmatizing their daughter as an adulteress by using terms which they did not comprehend as susceptible of any such meaning. And we cannot

House within a day or two after the receipt of the letter.

and has since lived under a constant fear.

There is nothing in the letter to indicate that

any person's name is mentioned in the letter.

There is also no mention of any person's name in the

letter. It is the letter which is mentioned in the

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letter. It is the letter which is mentioned in the

believe, in the light of this testimony, that defendant's parents when they signed that letter had the remotest idea that they were stigmatizing their daughter as an adulteress.

The testimony of the two detectives, even if given full credence, falls far short of proving even a suspicion of adultery between defendant and Vail. While these detectives shadowed defendant for several weeks and saw Vail and defendant at times together, they were never seen by them in any other but public places, surrounded by many people. It cannot be said that at any time these detectives came upon defendant and Vail when they were in a compromising position, or where the opportunity to commit adultery, if they so desired, was possible.

The Supreme Court has judicially frowned upon this class of testimony. In Blake v. Blake, 70 Ill. 622, the Court say:

"The employment of a private detective for the purpose of getting up evidence, though in some few cases they may afford useful assistance, is, as a rule, very objectionable. They are most dangerous agents, and the court looks upon their evidence with much suspicion. When a man sets up as a hired discoverer of supposed delinquencies; when the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then the man becomes a most dangerous instrument."

And the Court further say in the Blake case,

supra:

"It is insisted by appellant that the circumstances proven were amply sufficient to establish the fact that adultery was committed. There can be no doubt but adultery may be established by circumstantial evidence, but the proof, says Bishop, vol. 2, page 613, 'must convince the judicial mind affirmatively that actual adultery was committed, since nothing short of the carnal act can lay a foundation for divorce.'"

The like contention is made here, and the reasoning of the Court is as pertinent here as there.

We think the record is free from reversible error, that the decree of the Circuit Court is sustained by the evidence, and it is therefore affirmed.

AFFIRMED.



negative, to the point of fact, that the evidence is not sufficient to establish the guilt of the defendant.

The evidence is not sufficient to establish the guilt of the defendant, and the evidence is not sufficient to establish the guilt of the defendant.

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EVIDENCE

The evidence is not sufficient to establish the guilt of the defendant, and the evidence is not sufficient to establish the guilt of the defendant.

The evidence is not sufficient to establish the guilt of the defendant, and the evidence is not sufficient to establish the guilt of the defendant.

The evidence is not sufficient to establish the guilt of the defendant, and the evidence is not sufficient to establish the guilt of the defendant.



OTEN MURPHY, Appellee,

vs.

GUNNING SYSTEM, Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

197 I.A. 369

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

✓ This is an action on the case for personal injury in which the plaintiff recovered against the defendant in the Superior Court a judgment on the verdict of a jury for \$3,000, and defendant appeals.

This appeal is prosecuted from the second trial of the cause. On the first trial a verdict was instructed against plaintiff and this Court reversed the judgment entered on that verdict for the reason that in its opinion the facts found in the record should have been submitted to the jury for determination. The pleadings are the same as at the first trial. In the opinion of the Court on the former appeal the pleadings and the facts are fully stated; these we will not repeat, but refer to the opinion of the Court for the same, the syllabus of which appears in 184 Ill. App. 455. ✓ In the opinion referred to, this court said:

"The real question in this case must necessarily be one of fact, that is, whether or not the plaintiff in error was guilty of contributory negligence. The defect in the top cross bar caused by the presence of a large concealed knot was one of original construction, and was not caused by decay, or by subsequent wear or giving away of the bar by reason of anything that had happened to it after the frame work was put up, although the frame was about six years old. It was no such defect as plaintiff in error was required or expected to anticipate, and the evidence tends strongly to prove that by the exercise of ordinary care he would not and that in fact he did not find the defect, be-



cause it was covered up with the panel nailed over it, it is the duty of the master or employer to furnish to his employe a reasonably safe place in which to work, and reasonably safe appliances with which to work, and he can not relieve himself of that duty by delegating it to another."

It appears from the plaintiff's own testimony that the duty of inspection of the structure from which he fell was his. He testified that as foreman he understood it was his duty to look over and see whether the framework was safe, and if he saw anything the matter with it to fix it. If anything was wrong he was not to proceed. He recognized the further fact, to which he testified, that he owed the duty, as foreman of the workmen, to look out for the safety of the other men, and that duty included not sending them into a place that he could see was unsafe, and that in his examination it was his duty to look and see whether the nails were rotten so that the footboard was liable to break and give way.

Bearing in mind that the defendant is a corporation and the duty of inspection devolved upon plaintiff, it follows that exactness in the rulings of the court upon the evidence and pleadings and in the giving and refusing to give instructions was essential.

The structure was not erected by defendant, but purchased by it. Therefore, if the knot in the top board was the proximate cause of the accident or a contributing cause, and the defect was latent and not discoverable by the exercise of reasonable diligence in inspection, there may be some serious doubt as to the liability of defendant, although we do not at this time, in the conclusion to which we have come, deem it proper to solve that doubt.

The second count of the declaration charged as the sole act of negligence against defendant, that it failed





to maintain the footboard in a reasonably safe condition. Under the former decision of this Court it was decided that the duty of inspection rested upon plaintiff, and that he could not maintain an action for a defect in the footboard.

Defendant moved by an appropriate instruction to eliminate the second count from the consideration of the jury. This the Court denied. It was error to refuse so to instruct the jury, as there could be no recovery under the second count. It was also error for the Court to give the second instruction, which told the jury, inter alia, that if defendant failed to furnish a reasonably safe place for plaintiff to work and that plaintiff was injured thereby, "as charged in his declaration," they might find defendant guilty; and by no other instruction given were the jury told that there could be no recovery under the second count.

The third and ninth instructions are subject to the same criticism. The jury were told by the third instruction that there could be a recovery if plaintiff "had proved his case as laid in the declaration," and in the ninth instruction the jury were authorized to find defendant guilty if plaintiff's injury "was caused by the negligence of defendant, as alleged in the declaration herein."

These instructions were misleading, because the jury may have predicated its verdict upon the averments of the second count in the declaration, under which this Court had decided there could be no recovery. While the jury were amply instructed, at the instance of defendant, upon its theory of the case, still we are unable to say that the jury were not misled by the instructions which we regard as erroneous and by the failure of the Court to withdraw the second count of the declaration from the consideration of the jury.

Counsel for plaintiff cite Chicago City Ry. Co. v. Foster, 226 Ill. 288, as authority sustaining an instruc-





tion that the jury may find for the plaintiff, if they believe from the evidence that plaintiff has proven his case as laid in the declaration, even if there be some counts which are not supported by the evidence. The case at bar comes within the exception stated in the opinion. In the Foster case there was no request to eliminate any count or for an instruction that a recovery could not be had under any specified count of the declaration. On this condition of the record the determination of the Court was reached. In commenting on North Chicago Street Railroad Co. v. Polkey, 203 Ill. 225, relied upon by appellant in the Foster case, the Court say:

"That case does not sustain appellant. In the Polkey case, supra, there were five counts in the declaration, charging different acts of negligence as the cause of the injury. There was no evidence that tended to sustain some of them. The street railroad Company asked the Court to give instructions explaining the issues under the counts, but its request was denied, and the Court held that having given for plaintiff the general instruction that if he had made out his case as set forth in the declaration he was entitled to recover, and another instruction telling the jury that they were to try the issues under the averments of the declaration, it was erroneous to refuse defendant's instructions defining and explaining the issues. In this case no instructions were asked by appellant defining or explaining the issues under the averments of the declaration or any count thereof."

The Polkey case was reversed for like errors complained of here.

For the errors indicated the judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.



ISABELLA CURRAN,

Appellant,

vs.

L. K. CUSHING,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 371

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The judgment involved in this appeal is one of nil capiat, which plaintiff asks this Court to reverse.

The cause of action arises upon a lease of the third apartment at No. 4417 Drexel Boulevard, Chicago, the term of which commenced on May 1, 1913, and was to continue until the 30th of April, 1916, at a monthly rental of \$250. Under a power of attorney contained in the lease executed by the parties, dated March 14, 1913, judgment was entered for one month's rent with attorney's fees and costs.

On motion made by defendant and a pertinent showing of facts he was let in to plead. The cause was tried before court and jury and resulted in the judgment as above stated.

Defendant never moved into nor took possession of the apartment, either actually or constructively. His reason for refusing to pay rent and to take possession of the apartment was that the apartment was not fit for habitation. At the time the lease was made the building in which the apartment was situated was in course of construction, and on the first of May, 1913, it was in an incomplete condition in many respects. For instance, the elevator was



CHICAGO, ILL.  
JANUARY 10, 1913

THE COURT,  
JANUARY 10, 1913  
APPLICANT,  
VS.  
RESPONDENT.

100-10000

THE COURT, JANUARY 10, 1913, ORDERED THE DEED TO BE RECORDED.

The judgment involved in this appeal is one of  
the nature of a judgment in favor of the respondent,  
and the court is of the opinion that the judgment is  
correct. The cause of action arises from a lease of the  
premises at 100-10000, Chicago, Ill., the  
term of which commenced on May 1, 1912, and was to continue  
until the 30th of April, 1913, at a monthly rental of \$25.  
Under a power of attorney contained in the lease executed  
by the parties, dated March 14, 1913, judgment was entered  
for one month's rent with attorney's fees and costs.  
On motion made by defendant and a permanent  
injunction of enforcement was granted. The cause was  
tried before court and jury and resulted in the judgment  
as above stated.

Defendant never moved into nor took possession  
of the apartment, either actually or constructively. His  
reason for refusing to pay rent and to take possession of  
the apartment was that the apartment was not fit for habi-  
tation. At the time the lease was made the building in  
which the apartment was situated was in course of construc-  
tion, and on the first of May, 1913, it was in an incomplete  
condition in every respect. For instance, the elevator was



not installed; the front stairway leading from the ground upwards was not usable, and on the date the term commenced it was necessary to climb a step ladder to get to floors above the ground floor; for thirteen days thereafter the back and front stairways were of temporary construction, so that it was impossible to get household goods into the leased apartment in the usual way. By reason of such condition it was unsafe to attempt to get into the apartment by the temporary stairway, and the apartment itself was not sufficiently completed to make it comfortably habitable.

These facts are not seriously disputed. Plaintiff, however, meets this condition by the contention that defendant is estopped from claiming that the premises were not in a habitable condition at the time the term commenced, because his lease contained a covenant on his part that he had received possession of the demised premises in good order and condition. This covenant was patently contrary to the fact, which fact is not denied.

While in this State the landlord is not bound to put his tenant in possession as against third parties, still the landlord is bound to have the demised premises in a suitable condition for occupancy at the commencement of the term demised, so that the tenant may not only be able to take possession but to occupy the premises for the purpose for which they were leased. A failure of the landlord to have such premises in a habitable condition at the commencement of the term excuses the tenant from all the covenants of the lease which would otherwise be binding upon him, including the covenant to pay rent.

As to the covenant by defendant that he had received possession of the premises, the case of Ratkowski v. Nasolowski, 57 Ill. App. 525, is an authority. It was there

not included; the front hallway leading from the kitchen to the front door was not included, and the front door was not included. It was necessary to make a plan of the front door and the front floor; the kitchen and the bathroom are not on the front hallway, and the kitchen is connected to the front hallway by a doorway. It was necessary to make a plan of the front door and the front floor; the kitchen and the bathroom are not on the front hallway, and the kitchen is connected to the front hallway by a doorway.

Two days, which fact is not denied.  
but was cancelled. This movement was entirely different in  
had received knowledge of the situation previous to that time  
because his house contained a telephone in the fact that he  
not in a suitable condition at the time the fact was  
discovered is enough to show that the situation was  
settled, however, under this condition in the situation that  
these facts are not entirely different.

the Government is very small.

1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1901. The letter is signed by William McKinley and is addressed to Charles McNary. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.

held that the covenant could not have been true, as the term was not to begin for fifty days subsequent to the date of the lease, the difference in time between that case and this being but three days.

The law implies a covenant for quiet possession and enjoyment both against the acts of the landlord himself and paramount title. Ludden v. Stern, 20 Ill. App. 88; Field v. Herrick, 10 Ill. App. 591. In the Field case the court say the "plea alleges, in substance, that when the term granted in the lease commenced, the defendants were kept out of possession of the premises demised by the plaintiffs, and that neither they nor their assignees have ever received or been able to obtain possession of the same.

We are unable to see why the plea does not state a good defense to the action. It is true, the lease does not contain an express covenant of the lessor against incumbrances nor for quiet possession, but in the absence of such covenants, the law implies a covenant against all such acts of the landlord as destroy the beneficial enjoyment of the thing leased. The possession and quiet enjoyment of the premises by the lessee, without any hindrance on the part of the lessor is an implied condition to the obligation to pay rent."

In Leiferman v. Osten, 64 Ill. App. 578, the court, speaking by the late Mr. Justice Cary, say: "Now it is perfectly settled that disturbance in the enjoyment of an easement, or a deprivation of it, is not an eviction per se, but authorizes the tenant to treat it as an eviction by going out."





As plaintiff could not and did not give defendant possession of the apartment when the term demised commenced, defendant was released from the payment of rent and all the other covenants of the lease. The lease is the contract controlling our decision of this case, and while other phases of the case are discussed in the briefs we do not regard any of them as material to or as affecting the rights of the parties.

The verdict of the jury and the judgment of the Court thereon meet with our approval, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.



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1997-1998

APPROVED

CLARA DAVENPORT,  
Appellee,

vs.

CALUMET & SOUTH CHICAGO  
RAILWAY COMPANY, a cor-  
poration,

Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

197 I.A. 372

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$10,000 entered upon the verdict of a jury in an action on the case for personal injuries.

The case has been tried three times with varying fortunes to the combatants. First, a verdict for defendant was rendered and a new trial granted. On the second trial a verdict was returned in favor of plaintiff for \$2500, and on motion of defendant another new trial was allowed. The record of the third trial is now before us for review.

This is a passenger and carrier case. The declaration contains four counts. The negligence charged against defendant in the several counts is as follows:

In the first count it is charged that while plaintiff was in the act of alighting from defendant's car it was carelessly and negligently caused to be suddenly started and moved. The second count charges notice to defendant that plaintiff was about to alight from its car and that defendant at the time and place mentioned negligently and improperly failed and omitted to afford plaintiff a reasonable opportunity to alight from the car in safety, but negligently started and moved forward the car

THE UNIVERSITY OF CHICAGO  
CHICAGO, ILLINOIS  
U.S.A.

before the car had been stopped a sufficient length of time to permit plaintiff to safely alight therefrom. It is charged in the third count that while the car was at a standstill plaintiff, with other persons, attempted to alight therefrom, of which attempt defendant had actual or constructive notice, and that while so attempting to alight defendant started the car before plaintiff had an opportunity to alight in safety. The fourth count charges that the offending car was so carelessly and improperly managed and operated that by and through such negligence, mismanagement and the unskillfulness of defendant, by its servants, plaintiff was, while attempting to alight, thrown to the ground. To this declaration defendant pleaded not guilty.

The place where plaintiff fell off the car was at the north intersection of Ninety-first street and Buffalo avenue, while the car was proceeding south along the west track of defendant. Plaintiff was with her husband, a light-house keeper, and they were on their way home with their grandchild, which the husband was carrying. Plaintiff preceded her husband in her attempt to get off the car. Some years prior to the time of the accident there had been a car line on Ninety-first street across Buffalo avenue; this had been removed in April, 1910. Plaintiff contends that the usual stopping place for southbound cars was the north crosswalk, while defendant contends and proves that the south side of Ninety-first street was the stopping place for southbound cars by custom and the Company's rules. Before the removal of the cross-town line at Ninety-first street, all cars stopped on the near side approaching that street.

The accident happened November 5, 1910, near the hour of eight o'clock in the evening.

The testimony of plaintiff tends to prove that







her husband signaled the conductor when near Ninetieth street to stop at Ninety-first street, and that the conductor signified that he had caught the signal by nodding to her husband; that the car slowed up and stopped on the north side of Ninety-first street; that plaintiff and her husband walked to the rear of the car, she being in front of him; that several men were on the rear platform, as well as the conductor; that there were two steps from the platform of the car to the ground; that when plaintiff stepped from the first step, the car started with a jerk, and that by reason of the jerk she was thrown to the street and severely injured; that the car continued its course until it reached the south side of Ninety-first street, when it stopped.

The testimony of defendant tends to prove that the only customary stop made by cars at Buffalo avenue and Ninety-first street was on the south side of Ninety-first street where it intersects with Buffalo avenue; that a signal was given by the conductor to stop the car at Ninety-first street and that it slowed down and came gradually to a stop; that when the car was north of Ninety-first street plaintiff and her husband came upon the rear platform and walked to its edge; that the car was then proceeding south at about a three mile speed; that there was but one step between the platform and the ground; that as plaintiff started to step down the conductor called to her, "Lady, don't step off," but not heeding the conductor's warning she stepped off the car and fell to the ground; that no signal was given by the conductor to stop the car after the one given a short distance south of Ninetieth street to stop the car at Ninety-first street; that after plaintiff fell the car continued on until



it reached the south side of Ninety-first street, when it stopped for the only time after the conductor's signal to stop the car had been given south of Ninetieth street.

Five errors are assigned upon the record for reversal. The conclusion at which we have arrived renders all but the first assignment of error unimportant. The first assignment of error is that "This is manifestly a case in which the preponderance of the evidence shows that plaintiff's injury was not due to any negligence on the part of the defendant, but was due to her own improvident, if not negligent act in stepping off a moving car."

Plaintiff and her husband are the only witnesses supporting the theory of plaintiff as to how she came to fall off the car. While the witness Ryan was on the rear platform at the time of the accident, he evidently was non-observant of events until plaintiff fell from the platform. He can scarcely be regarded as a witness of the events which preceded and led up to the accident. On the other hand, defendant's theory as to how the accident happened is sustained in every essential particular by three witnesses, while as to the fact that at the time of the accident plaintiff stepped off the car while it was in motion, it is sustained by the testimony of all the witnesses to the accident - six in number - who were sworn for defendant. The evidence abundantly sustains the contention that plaintiff was not thrown from the car by its suddenly starting after having come to a standstill, but by plaintiff's stepping from the car while it was in motion. In so doing she was not in the exercise of due care for her own safety. It may be true that plaintiff thought the car was not in motion at the time she stepped off, but that does not change the fact that it was. Its motion may have been imperceptible to her, but even so, that cannot be attributed





to the negligence of defendant, but can be accounted for by the fact that the car had been slowed down by the motorman so that he might bring it to a standstill at the south crossing where the signal previously given to him by the conductor required him to stop the car. The plaintiff having failed to prove any act of negligence charged against defendant in her declaration or in any count thereof, the verdict of the jury and the judgment thereon cannot be allowed to stand.

It is an elementary legal principle that before plaintiff can recover damages in an action of this character for personal injury, proof sustaining by a preponderance of the evidence the negligence charged in some count of the declaration is indispensable. The evidence found in the record has no such preponderating force. As said in Siegmund v. Strackbein, 140 Ill. App. 454, "An affirmative statement, set with a flat and categorical denial by an equally credible witness, does not constitute that quantum of affirmative proof which the law requires to sustain a judgment." Here we are met with six witnesses, all of whom testify that plaintiff alighted while the car was in motion, directly contradicting the testimony of plaintiff and her husband that the car stopped and started with a jerk as she was about to alight, causing her to fall to the ground. On the quantum of proof this Court said in Kenyon v. Hampton, 70 Ill. App. 80, and the language is likewise applicable here: "It is a familiar rule that a plaintiff must make out his or her case by a preponderance of the evidence. In this case there was a clear failure by the appellee in such regard, and we are bound to hold that the verdict was so manifestly against the preponderance of the evidence as to require us to reverse the judgment."

This Court on review is not restrained, as the trial Court is, from determining the probative force of the





evidence, and when such evidence in its judgment fails to sustain the recovery, this Court may reverse the judgment with a finding of fact. This principle is fully stated in Loettker v. Chicago City Ry. Co., 150 Ill. App. 69, with citation of supporting authority. In that case the Court say:

"An examination of the whole evidence impels us to the conviction that it is insufficient to support the judgment. While it is true that primarily the jury are the judges of the probative force of the evidence and their finding is not to be lightly disturbed, yet when this court, upon a review of the record, is of the opinion that the verdict is clearly contrary to the manifest weight of the evidence, it becomes its duty to reverse a judgment resting upon such unsupported and unarranted verdict. This duty is imposed by the statutes of this State. As said by the court in C. & E. R. R. v. O'Connor, 119 Ill. 566: 'where there was evidence before the jury tending - how much is immaterial - to establish negligence, \* \* \* the question of the weight of it and of the reasonableness of the amount of damages belongs purely to the Appellate Court.' In Gehm v. The People, 87 Ill. App. 158, the court says: 'The question whether the evidence is sufficient to support the verdict is open to determination in this court; and while we must give due weight to the superior facilities possessed by the jury for determining the truth by seeing the manner of the witnesses upon the stand, yet that consideration is not conclusive upon us that their verdict is just.' The Supreme Court said in a chancery case, on questions of fact: 'When, as in the case at bar, the record shows that the verdict is against the clear weight and preponderance of the evidence, it will be set aside, as in cases of law,' vide Bradley v. Palmer, 193 Ill. 15; I. C. R. R. v. Cunningham, 102 Ill. App. 206; C. & E. R. R. v. Meech, 163 Ill. 305; B. E. & C. M. Co. v. Bennett, 96 Ill. App. 514. As was said in Borg v. C. M. I. & P. Ry., 162 Ill. 348: 'It is plain that the statute is designed to confer upon the Appellate Court more extended powers than are possessed by the judge of the trial court'."

The reasoning of the Loettker case is pertinent to the one at bar.

For the reasons hereinabove given the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.



The Court finds that defendant is not guilty of any of the acts of negligence charged against it in the plaintiff's declaration or any count thereof.

The Great Theorem is concerned with the question of  
 the existence of a set of all sets. It is the first  
 step in the theory of sets. It is the first step in the  
 theory of sets. It is the first step in the theory of sets.



197/373

379 - 21366.

WILLIAM SCHINDLER,  
Appellant,

vs.

LINK BELT MACHINERY  
COMPANY,  
Appellee.

APPEAL FROM

SUP RIOR COURT,  
COOK COUNTY.

197 I.A. 373

MR. JUSTICE MCLOOM DELIVERED THE OPINION OF THE COURT.

This is an action on the case for assault and battery alleged to have been committed by one Joseph Walsh, a foreman of the defendant company, upon the plaintiff, in the course of the business of defendant, etc.

The case has been twice tried. The first trial resulted in a verdict of \$9,000 and a new trial was granted at the instance of defendant. Upon a second trial the court instructed a verdict for defendant and entered a judgment of nil capiat thereon, from which plaintiff appeals.

Plaintiff's declaration consisted of two counts. A demurrer thereto was sustained to the first count and overruled as to the second. Plaintiff obtained leave to file additional counts, and a demurrer to these was sustained. Thereupon plaintiff obtained leave to file amended additional counts and did so, and a demurrer to them also was sustained.

The second count averred that "the defendant on to-wit, the eighth day of March, 1908, was a corporation doing business in the City of Chicago \* \*, and possessed of a certain \* \* plant or factory in which its said business was transacted; that in the course of said business said



corporation had and kept in its employment certain \* men who were engaged in the course of defendant's business as such manufacturing; and plaintiff avers that on to-wit the day aforesaid the defendant, by one of its servants, so engaged in the course of the business of defendant and in the course of the prosecution of the objects and purposes of said corporation, then and there with force and arms made an assault upon the body of plaintiff in the County aforesaid, and then and there inflicted upon the plaintiff the harms and injuries more particularly described in the first count of the plaintiff's declaration, and then and there other wrongs to the plaintiff did with force and arms," to his damage, etc.

The cause went to trial on the second count of the declaration, a plea of the general issue and three additional pleas, which were filed by leave of court after the first trial, with similiter to the plea of general issue and a replication to the three additional pleas.

We have carefully scanned the pleadings and the evidence in the record (the repetition of which at this time we do not regard as serving any good or useful purpose) and fail to find any errors in the court's rulings either upon the pleadings or the evidence.

At the time of the occurrences involved in this litigation the defendant was engaged in manufacturing the commodities its name implies, with a factory at Stewart Avenue and Thirty-ninth street in the City of Chicago. And was involved in what has been designated a "machinists' strike," in which some of the machinists working for defendant were participants.

As in the natural and historical course of events usually attendant upon strikes, the plant of defendant was



2

corporation had and kept in its employment certain \* men who were engaged in the course of defendant's business as such manufacturing; and plaintiff avers that on to-wit the day aforesaid the defendant, by one of its servants, so engaged in the course of the business of defendant and in the course of the prosecution of the objects and purposes of said corporation, then and there with force and arms made an assault upon the body of plaintiff in the County aforesaid, and then and there inflicted upon the plaintiff the harms and injuries more particularly described in the first count of the plaintiff's declaration, and then and there other wrongs to the plaintiff did with force and arms," to his damage, etc.

The cause went to trial on the second count of the declaration, a plea of the general issue and three additional pleas, which were filed by leave of court after the first trial, with similiter to the plea of general issue and a replication to the three additional pleas.

We have carefully scanned the pleadings and the evidence in the record (the repetition of which at this time we do not regard as serving any good or useful purpose) and fail to find any errors in the court's rulings either upon the pleadings or the evidence.

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As in the natural and historical course of events usually attendant upon strikes, the plant of defendant was





acted by union men in an attempt to prevent, by force or otherwise, those who were willing to work for defendant from doing so, with the intention of so crippling the business of defendant as to compel it to accede to the terms demanded by the union. It is in evidence that assaults were made upon the workmen of defendant, and that in going to and from their employment, mobs of strikers and others would block their path; that Walsh, the foreman, and McLean, one of the superintendents, had been in the habit of escorting some of the men to their homes, and that in the evening of the day that Walsh shot the plaintiff, McLean and Walsh escorted certain of the men employed by defendant from the plant towards their homes. This little band of workers, on their journey toward their homes, was followed by pickets and their children and stragglers, who gathered by the way until they reached a place about two doors north of thirty-sixth street on Wallace street.

While there had been no actual fighting on the way up to that point, there evidently was some considerable excitation, for it seems that some one threw a snowball which struck Walsh's hat off, whereupon Walsh flourished his revolver. Plaintiff then crossed from the west to the east side of the street and had some words with Walsh, and in that altercation Walsh shot the plaintiff. At this time there was no trouble between the strikers and Walsh or the men.

At the time of the shooting Walsh was in close proximity to his own home. Schindler, the plaintiff, was not a unionist, did not work for defendant, was not concerned in the strike and had no union affiliations. By occupation he was a road worker and had been working for Fairbanks & Company. It seems that plaintiff saw Walsh and the men coming out of the factory that evening and followed them to the place where



the shooting occurred. The altercation between Walsh and plaintiff was a personal one; they indulged in epithets; Walsh, so plaintiff testified, "punched" him before shooting him.

At the time of the shooting plaintiff was out of work and had been for about two weeks. He had no business at or near the plant of defendant. According to his own testimony, he sauntered to defendant's works in an aimless fashion. He testified that he did not know either he or Walsh or any of the men that were with them and that he was not interested in the strike in any way. Nevertheless, he followed along behind them.

The count under which the cause was tried averred that at the time of the assault the assaulting servant was engaged in the business of defendant and in the course of the prosecution of the objects and purposes of defendant's business. Plaintiff's own testimony demonstrates beyond doubt or cavil that neither Walsh nor McLean or the men with them at the time were engaged in the business of the defendant at the time of the shooting. They had all quit their work for the day and were on their way home and had arrived near the home of Walsh when plaintiff interfered with Walsh and those with him, and got into an altercation with Walsh. Neither the defendant nor Walsh nor the men with him had any business with plaintiff. The assault on plaintiff was not made in the course of the employment of Walsh or in furtherance of defendant's business. The fracas did not arise even out of the strike. It was purely personal to the combatants. Walsh was neither defending his employer nor any one with him at the time he shot plaintiff. The





5

trouble was solely between plaintiff and Walsh, for which the defendant was in no way responsible. The trouble was of plaintiff's own seeking. He interfered with a matter which was none of his concern; and while we do not wish to be understood as in any manner justifying Walsh's action, we cannot consent that defendant shall be held responsible for Walsh's indiscretion. That occurred between Walsh and plaintiff had not even the most remote relation to the employment of Walsh or the business of defendant.

It would seem to need no citation of authority to demonstrate that in these circumstances defendant is not answerable to plaintiff in this action, but nevertheless we will cite two. In C. & N. W. Ry. Co. v. Flexman, 103 Ill. 546, the Court say:

"But it is said, 'That if the plaintiff was injured by a servant of appellant, it was an act outside of the employment of the servant who committed the act, and not in furtherance of his employment by the master.' This position is predicated upon McIntus v. Cricket, 1 East, 106, and like cases which have followed it. In the case cited, Lord Kenyon said: 'it is laid down by Holt, Ch. J., as a general position, that no master is chargeable with the acts of his servant, but when he acts in the execution of the act ority given him. Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him and according to the doctrine of Lord Holt his master will not be answerable for such act.' The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should wilfully or maliciously assault a stranger - a person to whom the railroad company owed no obligation whatever - the master in such a case would not be liable for the act of the servant."

In C. C. Ry. Co. v. Logg, 44 Ill. App. 17, counsel for appellee put this question in this brief, which the Court copies into the opinion:

"Does the common law of Illinois hold that a servant doing the master's work at one instant may be guilty of an act of omission or commission which will render the master liable, and hold also at the very instant, without changing his occupation or his position or anything else pertaining to him, except the simple running of his name, he may inflict a deadly injury upon a third person for which the master is not liable?" and the Court laconically replies, "We think it does so hold."



The proof failing to support plaintiff's pleading, the action of the trial Judge in allowing the action of the defendant to instruct a verdict in its favor is without error, and the judgment of the Superior Court is affirmed.

AFFIRMED.



In re. Estate of JAMES FOSTER,  
deceased,  
On Appeal of WALTER FOSTER  
et al., Executors, etc.,  
Appellants,

vs.

W. H. HOPKINS,

Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

197 I.A. 374

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This action was tried in the Circuit Court on an appeal from the allowance of a claim in the Probate Court against the Estate of James Foster, deceased. The Circuit Court at the conclusion of all the evidence instructed the jury to find a verdict against the defendant estate, debt \$2,000, and to assess damages at \$964.50, and the executors prosecute this appeal.

The action was upon four bonds given in the Municipal Court to perfect writs of error from this Court to that. The four bonds were each made by W. G. Levandowski as principal and James Foster as surety, and ran to the plaintiff as obligee. Two of the bonds were for \$1,000 each, one for \$500 and one for \$300. The amount of the judgment is for rent of premises, 4548 Cottage Grove avenue, Chicago, and costs of suit, for which the bonds in suit were given as security.

It is first objected that all four bonds cannot be included in one action. However, defendants have failed to cite any authority supporting such contention and we are unable to find any. On the contrary, in Chitty on Pl., vol. 1, p. 199, the rule controlling is stated thus:

"In actions in form ex contractu, the plaintiff may join as many different counts as he has causes of action of the same nature in assumpsit; so also in covenant, debt, account, annuity, or scire facias. So debt on bond or specialty may be joined in the same action with debt on judgment, or on simple contract."



IN RE, ESTATE OF JAMES T. JONES, deceased,  
ON APPEAL OF JAMES T. JONES, deceased,  
vs. J. H. JONES, executor.

vs.  
J. H. JONES,

IN RE, ESTATE OF JAMES T. JONES, deceased,  
ON APPEAL OF JAMES T. JONES, deceased,

1971 A. 374

THE JUDICIAL BRANCH BELONGS TO THE PEOPLE OF THE STATE.

This action was tried in the Circuit Court in the  
appeal from the allowance of a claim in the estate of  
James T. Jones, deceased. The estate  
of James T. Jones, deceased, was  
represented by the executor, J. H. Jones,  
and the estate of James T. Jones, deceased,  
was represented by the executor, J. H. Jones.

The action was upon that bond given to the  
Circuit Court in protest of the report of the  
four bonds were each made by J. H. Jones, deceased,  
and each bond was for \$100,000, and the  
two of the bonds were for \$100,000 each, and the  
and one for \$50,000. The amount of the bonds is the  
provision, each bond was given to the  
and, the action was upon the bond given to the

It is first objected that the bond was  
not included in the action. However, the bond was  
filed and the action was upon the bond. The bond was  
filed in the action, and the action was upon the bond.

\*In action in form of a contract, the plaintiff  
may join as many different parties as are necessary to  
of the same nature in contract, as also in contract, and  
contract, or in contract. The action was upon the bond.

In C. W. D. Ry. Co. v. Ingraham, 131 Ill. 659,

the rule is thus stated:

"The general rule of the common law is, that where several causes of action of the same nature, - that is, which require at the common law the same judgment and are recoverable in the same form of action, - exist between the same parties, in the same right, they may all be joined by several counts, in one declaration. (Gould's Pl., chap. 4, secs. 79, 85, 103; Chitty's Pl. 228.) And this would be so, notwithstanding they might be so far several and distinct rights of action that a judgment for one would be no bar to a recovery for the other."

As no formal pleadings are required in the Probate Court, plaintiff was free, regardless of the rules of the common law, to embody all his claims against the deceased in one claim, and on appeal the case was tried de novo under the pleadings found in the record of the Probate Court.

An examination of the record discloses sufficient unchallenged evidence to sustain the judgment without the necessity of considering the testimony objected to as hearsay. The record amply proved the several breaches of the bonds in suit entitling plaintiff to recover the amount for which judgment was given.

The contention that the judgments recited in the bonds did not exist at the time the bonds were given, finds no support in the record.

It is also contended that Walter Foster, one of the executors of James Foster, deceased, who testified for plaintiff, was disqualified. The testimony of this witness is not abstracted; therefore we are not bound to consider it, although, contrary to the rule, we have gone to the record and examined it. His testimony was rendered competent by Sec. 2, Chap. 51 R. S. He testified to facts occurring subsequent to the death of his testator.

The objection next made is that the Court erred in refusing to receive in evidence certain records of the Municipal Court. Glassman v. Behr, 181 Ill. App. 258, settles



the point adversely to defendants' contention; it holds that the doctrine of estoppel prevents the surety from denying the judgments recited in the bonds, that the signature is "a solemn admission that there was such a judgment," and that the surety was estopped from afterwards denying what the bond asserted to be true.

And finally, it is contended that the Court was in error in instructing the jury as to the form and amount of its verdict. When the records of the Municipal Court offered by defendants were excluded, there was no countervailing proof in the case. In other words, in this condition of the record defendants were without a defense, and as this Court said in Eden v. Brey, 75 Ill. App. 102, "If there was no defense the trial Court was warranted in instructing the jury to find for the plaintiff."

No reversible error appearing in this record, the judgment of the Circuit Court is affirmed.

AFFIRMED.



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doctrine.



GEORGE C. NIMMONS,  
Appellee,

vs.

LYON & HEALY, a cor-  
poration,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

197 I.A. 376

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed by complainant, George C. Nimmons, an architect, to enforce a mechanic's lien for architect's fees claimed to be due from the defendant, Lyon & Healy, for preparing, making and drawing certain plans or preliminary sketches for a factory building which said Lyon & Healy contemplated erecting upon lot 4 in James W. Hedenberg's Subdivision, etc., in Chicago.

The cause, on bill, answer and replication was referred to a master, whose finding and report were in favor of complainant and recommended a decree giving him a lien upon said lot 4 for the sum of \$2,000, the amount due him for architect's fees. Objections to the report were overruled and they were by leave of court filed as exceptions before the Chancellor who, upon hearing, overruled the exceptions, confirmed the master's report and entered a decree granting a lien to complainant for the amount recommended by the master, and defendant appeals.

The preliminary controversy between the parties is the claim of complainant that defendant hired him to make the plans and sketches, while defendant insists that there was no hiring and that the plans and sketches were furnished in an effort on the part of complainant to procure their acceptance by defendant and his engagement as architect to erect the factory building contemplated by the plans.



There was much contradiction between the witnesses. The Master saw the witnesses and observed their manner and demeanor upon the witness stand, their fairness or prejudice, or lack of it, if such appeared, and therefrom was able to determine the credibility and weight to be accorded the evidence of the several witnesses. The master had privileges of observation denied us, and we must accord his findings of fact the same weight and consideration as we would the verdict of a jury in a suit at law. However, we have gone over all the testimony in the record and are of the opinion that complainant made out his case as stated in his bill, and that the variance claimed by defendant between the averments of complainant's bill and his proof does not exist.

We do not believe from the whole testimony that complainant drew the sketches and plans submitted on a chance that if they proved acceptable to defendant he would be employed as the architect for defendant's contemplated building. It was not a case of competitive plans, for to the time of the disagreement between Mr. Cratty and Mr. Simmons the record does not show that any other architect was contemplated or that any architect other than complainant furnished any drawings or was requested to do so. We think the record shows that the contention of defendant in this regard is inconsistent with its own proof and irreconcilable with the actions of its own officers having the matter in charge.

Mr. Cratty, an officer of the corporation and its legal counsel (unhappily since deceased), who was a lawyer of mature experience and of good reputation, gave no intimation by his words that he regarded the work of complainant as gratuitous or as being done upon a chance of his plans, etc., being finally accepted by his company. The testimony established as a fact that the final dismissal of complainant





was not brought about because his plans were unsatisfactory, but in a dispute between Cratty and Nimmons regarding a contractor named Leonard, who had originally brought Nimmons to the notice of defendant. In some way Mr. Cratty's suspicion as well as his ire seems to have been aroused in regard to a suggestion made by Nimmons that Leonard should be the contractor, and it was in such dispute that Nimmons was finally dismissed by Mr. Cratty.

It was not denied that Cratty at this time said, "if you think you ought to be paid for services rendered, we will pay the same." This was undoubtedly Cratty's - the lawyer's - estimate of the legal responsibility of his client, the defendant; at least such is inferable from the language he used. With this opinion of Mr. Cratty, if such was his opinion, we are in accord.

Defendant contends that complainant's failure to immediately accept Mr. Cratty's offer of payment precludes his now availing of that offer. The testimony demonstrates that Nimmons was much upset at the sudden termination of his employment, that he was anxious to continue in the employment of defendant and be its architect in the erection of its building, and with that end in view desired, as he suggested to Mr. Cratty, to see Mr. Larquette Healy, an officer of the defendant company, with whom he was apparently upon friendly terms. The fact that Mr. Healy would not join issue with Mr. Cratty's conclusion in no way deprived complainant of his right to receive payment for services which he had already rendered.

It is argued that complainant is not entitled to a lien for the services of preparing such plans, etc., because the building contemplated by the plans was not actually erected on the land sought to be charged with the





lien. The evidence shows not only that the plans were prepared for a building to be erected for defendant upon the land sought to be charged with the lien, but that a building in fact was afterwards erected thereon of the same general character as the one contemplated by the plans prepared by complainant. The Mechanic's Lien Act is sufficiently broad, in our opinion, to include complainant's claim for a lien, notwithstanding the fact that he did not superintend the construction. If plans had been furnished without relation to any particular plot of land, there might be some merit in the contention; but here the land was designated and the plans were prepared for a building to be erected on that land. The fact that afterwards the owner of the land concluded not to construct the building, did not operate to deprive the architect of the lien given to him by the statute. In this regard the Act of 1903 is the same as that of 1895, which is construed in Freeman v. Rinaker, 185 Ill. 176, in which the Court say:

"It was evidently the intention of the Legislature, by the Act of 1895, to give to architects a lien for their services for drawing plans and specifications for a building, as well as for their services in superintending the same. The words in Section 1, 'performed services as an architect for any such purpose,' refer back to the previous words, 'for the purpose of, or in building any house.' In other words, the lien is given for services as architect, not only in building any house, but for the purpose of building any house. When an architect draws plans and specifications for a building, even though he does not superintend its construction, he performs services for the purpose of building it."

While the lien in the Rinaker case was denied, it was placed altogether on other grounds than that the building covered by the plans was not constructed. We do not think that the lien of the architect for plans actually drawn is dependent upon the owner of the land erecting a building thereon as contemplated by such plans.

Complaint is made concerning the amount awarded



complainant, on the ground that the first bill which he rendered was for \$1600. The evidence shows that the \$1600 bill was a compromise and depended for its binding force upon its acceptance, and, not having been accepted, complainant was not bound by it. The contract having been ended by defendant before completion, complainant was entitled to recover under the proofs the amount which the Master awarded.

There is no reversible error in this record, and the decree of the Circuit Court is therefore affirmed.

AFFIRMED.





237 - 21218

JOHN CICHON,  
Defendant in Error,

vs.

MARIE GARTNER and  
FRANZ GARTNER,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 394

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 24, 1914, John Cichon, a licensed real estate broker, commenced a fourth class action in the Municipal Court of Chicago, to recover commissions alleged to have been earned by him in bringing about a sale of certain property situated in the city of Chicago and owned by defendants. Plaintiff further alleged in his statement of claim in substance that the defendant Franz Gartner employed plaintiff <sup>here</sup> to procure a purchaser for the property and agreed to pay plaintiff the usual broker's commission; that plaintiff afterwards procured Pietro Marcinkiewicz as a purchaser, ~~for the property~~, and on September 16, 1914, the sale was consummated at the price of \$2,525 by the delivery by defendants of a warranty deed to the property to said Marcinkiewicz; and that there was due plaintiff the sum of \$126.25, being 5% commission on said purchase price. Both defendants entered their appearance and Franz Gartner, in behalf of himself and his co-defendant, filed an affidavit of merits in which he alleged in substance that neither of the defendants at any time employed plaintiff or requested him to procure a purchaser for said property and that plaintiff never rendered any services whatever in the consummation of said sale and never had any dealings of any nature with defendants. The case was tried without a jury, resulting in the court finding the issues against the defendants and assessing plaintiff's

JOHN DICKSON,  
Defendant in Error.

vs.

FRANK DICKSON and  
PLAINTIFFS in Error.

1917.11.23

MR. FRANK DICKSON, JUDGE OF THE COURT, CHICAGO, ILLINOIS.

On October 24, 1914, John Dickson, a defendant in error,

estate of Frank, deceased, a fourth class estate in the United

Court of Chicago, to recover compensation alleged to have been

earned by him in bringing about a sale of certain property

situated in the city of Chicago and owned by defendants.

Plaintiff further alleged in his statement of claim in substance

that the defendant Frank Dickson employed plaintiff to procure

a purchaser for the property and agreed to pay plaintiff the

usual broker's commission; that plaintiff performed the

service and procured a purchaser for the property, and on

September 16, 1914, the sale was consummated at the price of

\$2,500 by the delivery by defendant of a warranty deed to the

property to said purchaser; and that there was due plaintiff

the sum of \$125.00, being 5% commission on said purchase price.

Both defendants entered their appearance and Frank Dickson, in

behalf of himself and his co-defendant, filed an affidavit of

veritas in which he alleged in substance that neither of the

defendants at any time employed plaintiff or procured him to

procure a purchaser for said property and that plaintiff never

rendered any services whatever in the procurement of said sale

and never had any dealing of any nature with defendant. The

case was tried without a jury, resulting in the court finding

the issue against the defendant and assessing plaintiff's

damages at the sum of \$120, upon which finding judgment against the defendants was entered.

It is first contended by counsel for the defendants that plaintiff did not show by a preponderance of the evidence that he was ever employed by either of the defendants to procure a purchaser for the property. While the testimony on this point is conflicting we cannot say that the finding is against the weight of the evidence. ~~Plaintiff's testimony was to the effect that in June, 1914, he, in company with Joseph Rytianski, called upon Franz Gartner and asked him if the property was for sale; that Gartner replied that defendants would sell the property for \$2,700, or even for a less sum for cash; and that Gartner also said that if plaintiff would procure a purchaser at a satisfactory price he would pay plaintiff a commission. In the above particulars plaintiff was corroborated by the testimony of the witness Rytianski. Franz Gartner denied having any such conversation with plaintiff, and Marie Gartner's testimony was to the effect that she never saw plaintiff. Plaintiff further testified that he had been in the real estate business for about three years and was familiar with the usual commissions allowed brokers for procuring a sale of residential property according to the rates of the real estate board, and that for a sale of such property at the price for which the sale in question was consummated the commissions were 5% on said price. The testimony of Joseph Olsowski was to the effect that he was an employe of plaintiff; that he was directed by plaintiff to find a purchaser for defendants' property; that he submitted the property to Marcinkiewicz; that on September 8, 1914, he, in company with Marcinkiewicz, called on Franz Gartner and informed him that he was an employe of plaintiff; and that on said date in his presence the contract for the purchase of said property was signed by Marcinkiewicz and Franz Gartner. Marcinkiewicz testified in~~

*in company with one Rytianski*  
*and*  
*as to the above facts*  
*the*  
*that*  
*defendants sold*  
*testified*  
*and*  
*and*  
*then*  
*in the presence of the witness*



damages at the sum of \$100,000, more or less, to be paid by the defendant.

Against the defendant was entered.

It is first contended by counsel for the defendant

that plaintiff did not show a privity of contract of the parties

that he was ever employed by either of the defendants in

property a purchaser for the property. This the defendant in

this point is contending we cannot say that the finding is

against the right of the evidence. Plaintiff's testimony was

to the effect that in June, 1911, he, the defendant, was

employed, called upon from his home, and that he

property was for sale; that he then received the

would sell the property for \$100,000, or more or less, and

cash; and that further also that it plaintiff's

grounds a purchaser as a purchaser, and that he

plaintiff a commission. In the above testimony plaintiff

corroborated by the testimony of the other witnesses, and

further testified that he had received the property, and

that he had received the property, and that he

plaintiff. Plaintiff further testified that he had

real estate commission for at least \$100,000, and that

with the usual commission without interest for property

sale of real estate property, and that he had

estate agent, and that for a sale of real estate he had

for which he had received the commission, and that

he had received the commission, and that he

to the effect that he had no privity of contract, and that

directed by plaintiff to find a purchaser for the property

property; that he advised the property to be sold

that on October 1, 1911, he, the defendant, was

called on by his father and informed that he was

analysis of plaintiff; and that he was

the contract for the purchase of real estate, and that

*was the only one who*

~~substance~~ that Olsowski called his attention to the property and that no one other than Olsowski spoke to him about it being for sale; that on September 8, 1914, he and Olsowski called on defendants and ~~that as a result of negotiations~~ then ~~had he~~ signed a contract for the purchase of the property at the agreed price of \$2,525, and that subsequently he received a deed to the property from defendants.

~~It was disclosed~~ *on* the cross-examination of plaintiff's witnesses, Olsowski and Marcinkiewicz, <sup>*appealed*</sup> that ~~after~~ <sup>*sale*</sup> the deal had been consummated Marcinkiewicz, at Olsowski's request, paid Olsowski the sum of \$10 "for finding the house." \*

Marcinkiewicz testified: "He wanted me to pay him \$25 for finding that place. I told him I wouldn't pay that, because I did not agree to pay commission. I then paid him \$10. He got \$10 of me because I ain't got to pay commission to buy a house."

It is ~~secondly~~ contended by counsel for defendants that, even if plaintiff was employed by defendants as their broker to bring about a sale of the property, plaintiff cannot recover commissions of defendants because it appears from the above testimony that plaintiff was also acting as a broker for Marcinkiewicz, and, it not appearing that the defendants knew of that fact, plaintiff was guilty of unfair dealing towards defendants. We cannot agree with the contention. ~~There is no~~

<sup>*+ There was no evidence*</sup> ~~does not disclose~~ that there was any agreement between plaintiff and Marcinkiewicz that in the event <sup>*if*</sup> plaintiff should find a satisfactory house for Marcinkiewicz the latter would pay to the former a commission. <sup>*+*</sup> ~~The testimony of Marcinkiewicz is to the contrary.~~ And we do not think it follows that,

because Marcinkiewicz saw fit after the deal was consummated to pay Olsowski the sum of \$10, and seemingly without plaintiff's knowledge or direction, plaintiff was guilty of such unfair dealing with defendants during the negotiations which resulted



in the transfer as to the recovery of the same  
 action. And we do not think that the rule announced in  
 the case cited by counsel (Farley v. Wright, 100 Ill.  
 404; Form v. Trainor, 120 Ill. 492; Boyd v.  
Lockens, 72 Ill. App. 412), and other similar cases, is  
 applicable to the facts of the instant case as disclosed  
 from the evidence.

Finding no reversible error in the record for  
 judgment of the trial court is affirmed.

Reversed.

13 - 20425

THOMAS PELLUM,  
Defendant in Error,

vs.

AARON B. MEAD,  
Plaintiff in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 396

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Pellum, plaintiff below, was a junk peddler and dealer and occupied a barn on the rear of certain premises in Chicago where he kept his horse, wagon and junk. The premises belonged to an estate of which Mead was agent. Through him a cottage on the front of the premises was leased to defendant Hawkins, who without title or authority rented the barn to plaintiff. Pursuant to a notice from the city health department defendant Mead, acting under the directions of the owners, hired one Grass to tear down the barn. Thereupon Pellum brought suit against Hawkins and Mead, claiming that without notice from either of them to him, Mead tore down the barn and his chattels therein were destroyed and removed through the negligence of defendants in consequence of which he suffered damages.

Hawkins was defaulted for want of an affidavit of merits; but she testified that she had no notice or knowledge that the barn was to be torn down. There was nothing in the proof or circumstances that tended to raise any special duty on her part to protect plaintiff's property or to establish liability against her.

Mead testified that he had no knowledge of plaintiff's occupancy of the barn, and, in the absence of proof of any privity of contract or relationship between him

THOMAS KELLY, defendant in error,  
vs.  
JAMES F. KELLY, plaintiff in error.

STATE OF  
ILLINOIS  
OF JUDICIAL

107 A. 386

W. J. KELLY, JUDGE OF THE CIRCUIT COURT OF THE COUNTY OF COOK, ILLINOIS.

William, plaintiff below, was a bona fide and  
dealer and occupied a barn on the west of certain premises  
in Chicago where he kept his horse, wagon and tools. The  
premises belonged to an estate of which said estate  
through him a cottage on the front of the premises was  
leased to defendant herein, who also had title to the property  
rented the barn to plaintiff. Defendant is seeking from  
the city health department defendant's horse, wagon and tools  
directions of the court, since one of the terms of the  
barn. Thomas Kelly states said horse, wagon and  
tools, claiming that said horse, wagon and tools are  
his, and that the barn and his horse, wagon and tools  
destroyed and removed from the premises of defendant in  
consequence of which he suffered damage.

Defendant was informed for want of an affidavit of  
error; but the plaintiff has not had an affidavit of error  
that the barn was to be torn down. There was nothing in the  
fact or circumstances that would be a basis for an affidavit  
on her part to protect plaintiff's property as an affidavit  
plaintiff asked her.

Read certified that he had no objection to  
plaintiff's occupancy of the barn, and, in any manner it  
proof of any injury or damage or loss of property.

and plaintiff, there was nothing to show that he owed plaintiff any other duty than the exercise of reasonable care to protect his chattels from loss or damage until plaintiff had a reasonable opportunity to remove them from the premises. But the record contains no proof of what became of the goods. While plaintiff proved they were in the barn when he left in the morning he did not prove they were not on the premises when he returned and found the barn torn down. But if it can be said that the evidence tends to establish negligence in the failure of Mead to exercise reasonable care of the goods until plaintiff had a reasonable opportunity to remove them, yet the court erroneously rejected Mead's offer to prove the averment made in his affidavit of merits that no goods found in the barn or on the premises were taken away or destroyed as charged in plaintiff's statement of claim. The judgment, therefore, will have to be reversed and the cause remanded not only because the record fails to disclose joint liability but because of the rejection of competent evidence for the defense.

REVERSED AND REMANDED.



and plaintiff, there was nothing to show that he owed plaintiff any other duty than the exercise of reasonable care to protect his chattels from loss or damage which plaintiff had a reasonable opportunity to remove from the premises, but the record relating to the fact that because of the smoke, while plaintiff stayed in the barn when he left in the morning he did not prove they were not on the premises when he returned and found the barn torn down. But it is not shown that the evidence tends to establish negligence in the failure of defendant to exercise reasonable care in the removal of the chattels. Plaintiff had a reasonable opportunity to remove them, yet the court erroneously rejected plaintiff's offer to prove the chattels were in the vicinity of the barn when it was found in the barn or on the premises and since they were destroyed as charged in plaintiff's complaint of damage. The judgment, therefore, will have to be reversed and the cause remanded not only because the record fails to disclose joint liability but because of the introduction of competent evidence for the defense.

REVEREND AND HONORABLE,



AMANDA GERLOCK,  
Plaintiff in Error,  
vs.  
JOHN W. CONROY,  
Defendant in Error.

ERROR TO  
CIRCUIT COURT,  
COOK COUNTY.

197 I.A. 398

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit on a breach of promise of marriage. The court took the case from the jury and directed a verdict for defendant against plaintiff's objection and refused to grant a new trial.

The evidence tended to show that after a break in the previous relations of the parties that led to a financial settlement, he resumed his attentions to her and told her that they would marry, that she assented; that at his request she procured a divorce from her husband from whom she had not heard for over fifteen years; that after the divorce at his request and upon repetition of his statement that they were to marry, she sold her house; that he said in the presence of others that they were to marry, and after calling on her frequently for two years told her he had changed his mind about marrying her.

While there were features of the case that affected the value of plaintiff's evidence, yet its weight was not for the court but the jury, and as it was reasonably capable of construction favorable to her contention that there was a promise of marriage and a breach thereof, the court should have submitted the case to the jury. (Wolf Co. v. Monarch Ref. Co., 252 Ill. 491, 501). The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

1945-1946

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YOUNG, J. W. 1963. p. 385-390.

1. The first step is to identify the problem or question that needs to be answered.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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L. H. BRINK and IGITATZ PILAT,  
doing business as BRINK AND  
PILAT,

Plaintiffs in Error,

vs.

M. FINKELSTEIN and S. ROSENTHAL,  
Defendants in Error.

MEMORANDUM FOR THE HONORABLE  
COURT OF CHICAGO.

197 I.A. 399

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought a suit against defendants for goods sold and delivered by plaintiffs to defendants at their request. Plaintiffs were commission merchants and Finkelstein was a dealer in poultry. Rosenthal was Finkelstein's real estate agent and accommodated him at times by giving him checks for cash. The goods sued for were sold and delivered to Finkelstein between December 9 and 14, 1912. Plaintiffs had previously sold and delivered to him similar goods and received payments therefor in the form of checks signed by Rosenthal. It was claimed by plaintiffs that before the sale and delivery of said goods Rosenthal had promised to pay for them over the telephone. Rosenthal denied that he had made any such promise, or that he ever talked over the telephone to or saw plaintiffs until after the transactions sued on were had, when he endeavored to effect a settlement. He said that when he gave the checks in question it was for cash given him by Finkelstein to the amount of plaintiffs' bills. He was corroborated by Finkelstein. The only question at issue was whether Rosenthal made an original promise to pay for the goods. The court heard and saw all the witnesses and was better able to determine the facts from the contradictory testimony than we are. We cannot say that its finding was manifestly against the weight of the evidence, and as that is the only question

IN THE COURT OF THE DISTRICT OF COLUMBIA  
 IN RE: THE ESTATE OF JAMES EARL RAY, JR.  
 DECEASED

TESTAMENTS OF JAMES EARL RAY, JR.

VS.

THE UNITED STATES OF AMERICA  
 PLAINTIFF

1971.333

BY JUDITH KATZ, Attorney for Plaintiff

THE UNITED STATES OF AMERICA

THE COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES EARL RAY, JR.

DECEASED

TESTAMENTS OF JAMES EARL RAY, JR.

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IN THE COURT OF THE DISTRICT OF COLUMBIA

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DECEASED



presented on this record for our consideration, the judgment  
will be affirmed.

AFFIRMED.



THE RESULTS OF THE INVESTIGATION OF THE  
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THE RESULTS OF THE INVESTIGATION OF THE

GEORGE HOEY,  
Defendant in Error,

vs.

ALCAZAR AMUSEMENT CO.,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 411

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Hoey brought suit against the Alcazar Amusement Company to recover money under a written contract for a theatrical performance given July 6, 1914, and damages for failure of defendant to permit him to perform for the following six days of the week.

The contract begins <sup>an</sup> with a recital that it is <sup>was</sup> an agreement between said company and "In Old New York (Geo. Hoey, Mgr.)," to be designated thereafter in the contract as manager and artist respectively. By its terms the manager engaged the artist "in his specialty or act" for a period of one week commencing July 6th, at the price of \$350.

<sup>Defendant</sup> ~~Plaintiff in error~~ <sup>that</sup> urges it was not a contract between the parties because Hoey <sup>was</sup> ~~is~~ not referred to as a party in the body thereof. The contract was signed by each of the parties and the evidence tends to show that the term "In Old New York, Geo. Hoey, Mgr." was a name used by Hoey to designate his company of performers composed of himself and his employees, and that <sup>defendant</sup> ~~plaintiff in error~~ knew it was dealing with Hoey personally and no one else. There was a manifest meeting of minds.

Plaintiff in error calls attention to a decision of this court filed October 5, 1915, in Alcazar Amusement



Company v. Pereira, holding that because Pereira was not named as a contracting party in the body of the instrument sued on it did not appear to be a contract between the parties to the suit. But that was on demurrer. Here the point does not arise on demurrer or motion to strike but on the evidence, defendant having raised the issue as one of fact, and the evidence sustains plaintiff's side of it.

~~It is also urged as error that~~ The court refused to permit defendant to prove whether or not one Jacobs employed by the booking agency that negotiated the contract between Hoey and said company reported to the latter a conversation he had with Hoey. The conversation had no probative value unless it tended to show an admission by Hoey that he had abandoned the contract. We do not think it reasonably capable of that construction. But otherwise we fail to see that reporting the conversation would have added any special value to it in the absence of proof that Jacobs was acting at the time as an authorized agent for one party or the other. The court also ~~properly~~ excluded a letter from said booking agency to the defendant purporting to accept for Hoey defendant's cancellation of the contract. There was no proof that it had any authority so to do, nor evidence justifying the cancellation.

It is further contended that there was no liability on the part of defendant because of a clause in the contract that a failure on the part of either party to perform "such week" should not be deemed a violation of its terms by either party. ~~It is evident that~~ In framing the contract the parties used a printed form of the booking agency designed to cover various situations, and that said clause refers to a situation where a contract is made for a longer time than one week, which was not the case here.



Company v. Fortin, holding that company's name was not  
named as a contracting party in the body of the instrument

and as it did not appear to be a contract between the  
parties to the suit. But that was not the case. Here the  
plaintiff was not a party to the contract. It was made  
on the evidence, between the parties to the contract, and  
of fact, and the evidence established the fact of it.  
It is also stated as a fact that the contract was made

to permit defendant to prove that he was not a party  
to the contract, and that the contract was made between

between the parties to the contract, and that the contract was made

between the parties to the contract, and that the contract was made

between the parties to the contract, and that the contract was made

between the parties to the contract, and that the contract was made

between the parties to the contract, and that the contract was made

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between the parties to the contract, and that the contract was made



We think the evidence was sufficient to show a contract between the parties and that plaintiff did not abandon it nor authorize its cancellation. We find no reversible error. The judgment will be affirmed.

AFFIRMED.

to think the evidence was sufficient to show a conspiracy  
between the parties and that the plaintiff's claim was  
not supported by the evidence. The judgment will be affirmed.

ALBERT MOSES,  
Defendant in Error,

vs.

LAZAR JACOBSON,  
Plaintiff in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 413

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

4 - *Robert* Moses, plaintiff below, brought an attachment suit against *Lazar* Jacobson, defendant below, on the ground that defendant was a non-resident of the state and owed plaintiff a sum of money deposited on the purchase price of machinery which defendant had not delivered to plaintiff, and receivers of the Pere Marquette R. R. Co. were summoned as garnishees. *See* Defendant Jacobson put in a general appearance. *B* There is no bill of exceptions, but the record shows that evidence was heard and that the court found against defendant both as to the attachment and the merits of the action and assessed plaintiff's damages at \$500 and costs. While judgment was entered on the main issues only, it must be presumed, in the absence of a bill of exceptions, that the court heard sufficient evidence to support it, and it is immaterial whether any judgment was entered on the attachment issue.

The judgment will be affirmed.

AFFIRMED.

ALBERT MOSES, Defendant in Error,  
vs.  
LARRY JACKSON, Plaintiff in Error.

WRIT OF HABEAS CORPUS  
OF COLORADO

1917.11.13

MR. JUSTICE, SAN FRANCISCO DIVISION OF THE SUPREME COURT.

Moses, plaintiff below, through his attorney  
sue against Jackson, defendant below, on the ground that  
defendant was a non-resident of the State and used plaintiff  
a sum of money deposited in the purchase price of real property  
which defendant had not delivered to plaintiff, and  
receivers of the First National Bank of Denver, as  
guarantors. Defendant Jackson has in a general appearance.  
There is no bill of exceptions, but the record shows that  
evidence was heard and that the court found against defendant  
both as to the attachment and the writ of the writ and  
advised plaintiff's damages at \$500 and costs. This  
judgment was entered on the main issue only, it was so  
presumed, in the absence of a bill of exceptions, that the  
court heard sufficient evidence to support it, and it is  
material whether any judgment was entered on the attachment  
issue.

The judgment will be affirmed.

ATTEST.

HOWARD CARLSON, a minor  
by C. G. CARLSON, his  
next friend, Defendant in Error,

vs.

SIMEON SWENSON,  
Plaintiff in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 414

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The errors assigned on this record embrace two contentions, (1) that the court erred in refusing defendant's motion for a directed verdict made at the close of plaintiff's case, and (2) that the verdict was manifestly against the weight of the evidence.

The first point is not preserved for review because after the motion was overruled defendant introduced his proofs and did not renew the motion at the close of all the evidence (Reavely v. Harris, 239 Ill. 526), and defendant in error urges that the second point likewise is not preserved, as the motion for new trial and the ruling thereon do not appear in the bill of exceptions. That they should so appear together with the taking of an exception to the ruling has been the settled practice (Call v. People, 201 id. 526 and cases cited). Whether since the amendment in 1911 to section 81 of the Practice Act, dispensing with the necessity of incorporating formal exceptions into the record, (Miller v. Anderson, 269 id. 608), that rule of practice should obtain where the transcript of the record, as in this case, contains a specific order of court overruling and denying the motion for a new trial, may well be questioned. Such an order presumably would not have been entered had the



ROBERT DAVISON, a minor  
by G. B. DAVISON, his  
next friend,  
Defendants in Error,

vs.  
SINGH SINGH,  
Plaintiff in Error.

1031 A. 414

ON WRIT OF HABEAS CORPUS TO REMOVE FROM PRISON.

The error assigned on this record appears to be  
entirely immaterial, (1) that the writ issued in violation of the  
provision for a writ of habeas corpus and (2) that the writ issued in  
violation of the writ of habeas corpus, and (3) that the writ issued in  
violation of the writ of habeas corpus.

The first point is not preserved for review because  
after the motion was overruled and no other grounds were  
presented and it is not necessary to review the motion at all the  
evidence (People v. Smith, 100 Cal. 400), and no other point is  
presented. The second point is not preserved, and the motion for  
a new trial and for setting aside the verdict is not  
presented.

Agony in the bill of exceptions. The bill of exceptions  
agrees together with the finding of no exception to the finding  
and from the bill of exceptions (People v. Smith, 100 Cal. 400)  
and cases cited. Further since the amendment to bill of  
exceptions 51 of the practice act, requiring that the bill of  
exceptions be filed with the finding of no exception, (People v. Smith,  
100 Cal. 400), and since the finding of no exception is filed  
with the finding of no exception, as is the case, it is not  
necessary to review the finding of no exception and finding  
of no exception for a new trial, and will be granted.

motion not been made; and, as it need not have been in writing nor an exception to the ruling preserved, the reason for the application of the rule to the case at bar apparently fails.

However, be that as it may, no advantage would accrue to plaintiff in error, for, on examination of the evidence in the case, we can not say that the verdict was manifestly against the weight of the evidence. It tends to show that defendant conducted a theatre on his premises in the lobby of which were pictures and advertisements hung for the public to come in and see, and that in the wall of the lobby was a radiator so insecurely fastened that without apparent negligence on the part of the <sup>plaintiff, a</sup> minor, ~~for whom the~~ ~~suit was brought~~, it fell out of its place on and injured him while he was looking at the pictures, ~~we think the~~ <sup>being to</sup> circumstances ~~were~~ such as raised the inference of neglect on the part of defendant to have the radiator so fastened that it would not fall over from contact with it such as might be expected in a public place. B

The judgment will be affirmed.

AFFIRMED.

action not been made; and, as it has not been made in  
writing nor an exception to the rule, however, the reason  
for the application of the rule to the case at hand is  
this.

However, for that is it not, the evidence is

shown to be directly in point, for, the evidence of the

evidence is not made, we can not say that the evidence was

wholly against the rule of the evidence. It tends to

show that defendant committed a crime on his person in

the lobby of which were present and defendant's name for

the public to come in and see, and that in the way of the

lobby was a display of defendant's name, and that

defendant's name was on the part of the lobby, and that

defendant's name was on the part of the lobby, and that

his name was on the part of the lobby, and that

circumstances were such as to raise the inference of guilt of

on the part of defendant, and that the evidence was

that it tends to show that defendant was in the lobby

and that he was in the lobby at the time.

The inference will be drawn.

Witness.

ALF. RIPPON,  
Defendant in Error, )  
vs. )  
ALCAZAR AMUSEMENT CO.,  
Plaintiff in Error. )

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 416

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff's claim was for <sup>4</sup> damages for breach of contract <sup>in</sup> for refusing to permit <sup>the plaintiff</sup> him to carry out a theatrical engagement, ~~according to its terms for one week beginning October 12, 1914.~~ <sup>The plaintiff</sup> He presented himself on ~~that~~ <sup>the date stipulated in the contract</sup> date but was not permitted by defendant to perform and was unable to procure employment after diligent search therefor <sup>the period of engagement.</sup> during ~~said week.~~ <sup>from a</sup> ~~There was a verdict and judgment for the~~ contract price of the ~~week's~~ performance, and costs of suit <sup>B</sup>

Because the contract was not signed by plaintiff Ripon it is contended that no contract existed. Defendant signed the contract and it was sufficiently clear from the evidence that it accepted the contract for it thereupon entered the engagement with Ripon on its books. Hence it was not necessary to its obligation under the contract that plaintiff should have signed it or that it should have been in writing. He did not disclaim obligations under it and stood ready and willing to perform. If it was not good as a written, it was as a verbal contract. There was sufficient evidence for the jury to find the existence of a contract and against defendant's contention that the written instrument was a mere proposal that was revoked and cancelled by defendant before acceptance or action thereon by Ripon.

The agreement contains a recital that a failure



014 14.1-501

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and the following conditions:

THE END OF THE JOURNALS OF WILLIAM JOSEPH DAVIS, 1801-1892, VOL. 11

THE KING: I have been thinking of you all day, and I have been thinking of the things that you have done for me. I have been thinking of the things that you have done for me.

It is important to note that the results of this study are not generalizable to all populations.

• 1000 km<sup>2</sup> system, 1000 km<sup>2</sup> system, 1000 km<sup>2</sup> system

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on the part of either party to perform on "such week" shall not be deemed a violation of its terms. The contract was drawn on a printed form evidently designed to cover different situations, and the recital clearly refers to a case where the term of the engagement is longer than one week, which is not the case here.

We do not find reversible error either in the remarks of counsel for plaintiff or in other respects.

The judgment will be affirmed.

AFFIRMED.

On the part of either party as provided in "Warrant" shall not be deemed a violation of the law. The defendant shall draw on a printed form as provided herein to cover the several allegations, and the official records shall be made where the fact of the defendant is known and the week, which is not the case here.

The following will be returned.

138 - 21112

GEO. E. FORD,  
Defendant in Error,

vs.

M. PIOWATY & SONS, A Corp.,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 417

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Ford brought a suit against plaintiff in error, a corporation for the purchase price of goods sold and delivered at its special instance and request. To prove the contract Ford testified to conversations with one Max Piowaty which, unexplained or unaided by other competent testimony, merely tended to show a deal with said Piowaty and not with the corporation. There was no competent proof that he was an officer or authorized agent of the corporation, and to establish liability secondary evidence was offered and received over objection without laying a proper foundation therefor. It consisted of the contents of a check purporting to come from defendant without adequate proof of notice to produce the original; also of a letter purporting to come from defendant without adequate proof either that it came from or was authorized by defendant and of certain enclosures therewith that were incompetent without adequate proof of the letter itself. Without proof of these matters there was insufficient evidence to sustain the judgment, hence the errors in the court's rulings necessitate the reversal of the judgment and the remanding of the cause for a new trial.

REVERSED AND REMANDED.





FRANK SCHOENFELD,  
Defendant in Error,

vs.

THE LAKE SHORE & MICHIGAN  
SOUTHERN RAILWAY CO., a corp.,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 419

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant in error purchased of plaintiff in error two tickets from Chicago to York Beach, Maine, and return, via the line of defendant to Buffalo, N. Y. and from there to Boston, Mass. via the line of the Boston & Albany R. R. Co. and from the latter point to York Beach via the line of the Boston & Maine R. R. Co. The Boston & Albany R. R. Co. refused to honor the tickets from Boston to Buffalo, necessitating an expenditure of \$20 by defendant in error for transportation between those points, to recover which he brought suit against plaintiff in error. The case was tried before the court without a jury.

Plaintiff's testimony tended to establish the above state of facts but failed to show the capacity in which the defendant company sold the tickets in question or to refute the presumption that it acted as a mere agent for the other lines. In that state of the case counsel moved, in effect, for a finding for the defendant, calling the court's attention to the decision of the Supreme Court in Chicago & Alton R. R. Co. v. Kulford, 162 Ill. 522, where the court adhered to the rule generally followed in this country that through tickets entitling persons holding them to pass over successive roads are to be regarded as distinct tickets for each road, sold by the first company as an agent for the others so far as the passenger is concerned. But



THE EAST & WEST  
SOUTHERN RAILWAY CO., a corp.  
defendant in error,  
vs.  
FRANK SCHMIDT,  
defendant in error.

184 - 2111

ALL JUSTICE SHALL BE GIVEN TO THE TRUTH.

Defendant in error presented by plaintiff in error two tickets from Chicago to New York, dated, and returned, via the line of defendant in error, and two tickets, dated, and returned, via the line of the Eastern & Western N. Y. Co., and from the latter point to New York via the line of the Eastern & Western N. Y. Co. The Eastern & Western N. Y. Co. refused to honor the tickets from Chicago to New York, necessitating an expenditure of two by defendant in error for transportation between those cities; in return which he brought suit against plaintiff in error. The case was tried before the court without a jury.

Plaintiff's testimony tended to establish the above state of facts but failed to show the company in which the defendant company sold the tickets in question to be the same as the company which issued the tickets. The defendant in error in its answer moved, and other lines, in each case of the same nature moved, in effect, for a finding for the defendant, and the court's attention to the decision of the Supreme Court in Chicago & North Western R. Co. v. Illinois, 184 Ill. 511, 1898, the court adhered to the rule previously followed in this country that through tickets entitling persons to travel from one place to another are to be regarded as tickets for each road, and up to the first company as an agent for the entire line on the route is concerned. The

the trial court ignored the decision saying it was not "human justice." As both the trial and this court are required to follow the decisions of the Supreme Court, the judgment must be reversed as contrary to law.

REVERSED.

THE CHIEF CLERK ADVISED THE DEPUTY CLERK THAT HE WAS NOT  
 AVAILABLE. AS SUCH THE DEPUTY CLERK WAS ADVISED TO  
 FOLLOW THE DECISIONS OF THE DEPUTY CLERK. THE DEPUTY CLERK  
 BE PREPARED AS ADVISED TO DO.

RECEIVED

[The following text is extremely faint and largely illegible. It appears to be a series of lines of text, possibly a list or a series of paragraphs, but the content cannot be accurately transcribed.]

THE PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in Error,

vs.

ORRIN J. SHAFER,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 420

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury, plaintiff in error was convicted on an information charging him with violation of Sec. 10 of the Motor Vehicle Act (Ch. 121, Par. 269, J. Murd's R. S. 1911), prohibiting the driving of a motor vehicle "upon any public highway at a speed greater than reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

The principal issue of fact raised at the hearing was as to the speed at which plaintiff in error was driving an automobile in a locality where speed in excess of fifteen miles an hour is by the act made prima facie evidence of its violation. On that issue there was one witness only on behalf of the People. He testified that the car was going twenty-five miles an hour. In his own behalf, defendant testified that he was not driving faster than twelve miles an hour, that his car went about fifteen feet after he started to stop it, and that he could stop it within that distance when running twelve miles an hour. The trial Judge then announced that it was unnecessary for him to hear any more evidence, that because of his own experience





in driving a car he could not accept defendant's testimony as to speed. Defendant's counsel asked leave to call other witnesses and offered to prove by them that defendant was not running faster than twelve miles an hour and other circumstances relevant to the issue. The Court refused to hear them, saying "if you had fifty more witnesses, it would not change the mind of the court."

The refusal of defendant's request was a denial of rights so fundamental that comment is unnecessary. It was a palpable denial of justice, not only to refuse the manifest right to produce witnesses to support defendant's plea of not guilty, but to decide the issues on the judge's private experiences instead of evidence. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.



525 - 20858

WILLIAM C. HARTRAY,  
Administrator of the  
estate of THOMAS M. SMITH,  
Deceased,

Appellee,

vs.

CITY OF CHICAGO,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

197 I.A. 446

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant to recover damages sustained by the next of kin (consisting of the widow and six minor children) of Thomas M. Smith, deceased, because of his death alleged to have been caused by the negligence of the appellant on March 7, 1908. This case was before this court at a former term on an appeal prosecuted by the present appellant from a judgment in favor of appellee, reported in 182 Ill. App. 134, reversing the judgment because of error in improperly admitting testimony of the existence of a particular defect in the street pavement of Elston Avenue, in the City of Chicago, which did not contribute to the injury of appellee's intestate, and on the further ground that the evidence did not sufficiently prove that the appellant, the City of Chicago, had notice either of the existence of a certain other defect, if any existed in said street, or of its dangerous condition, if it was dangerous, which contributed to the injury and death of appellee's intestate. On the last trial a verdict was returned and judgment rendered in favor of appellee for eighty five hundred dollars. From that judgment this appeal is prosecuted. No change has been made in the pleadings

WILLIAM O. BARTLEY,  
Administrator of the  
Estate of THOMAS M. BARTLEY,  
Deceased.

THOMAS M. BARTLEY,  
Deceased.

v.

CITY OF BIRMINGHAM,  
Alabama.

1971.1.1.48

27. JUDGE ROBERTSON, JUDGE OF THE COURT.

Applicant was appointed as receiver of the

estate of the late of his (consolidated) of the late of  
his other children) of Thomas M. Bartley, deceased, because  
of his death alleged to have been caused by the negligence  
of the applicant on March 7, 1907. The late was before

this court as a former tenant of an estate of the late of the  
present applicant from a judgment in favor of the late,

reported in 1907 Ill. App. 101, reversing the judgment.

because of error in the report of the testimony of the  
existence of a partitioned estate in the late's possession at  
the time of his death, in the City of Birmingham, which was not  
tributed to the injury of the late's interest, but to the

fact that the late was not notified of the existence of the  
estate of the late, the City of Birmingham, and that the late  
of the existence of a certain estate, it was not  
in said estate, or of the late's interest, it is not

known, which contributed to the injury and death of  
applicant's interest. On the last trial a verdict was

returned and judgment rendered in favor of the late for  
the sum of \$100,000.00, from which the late's interest  
is protected. The court has now made an order



since the former appeal.

On November 2, 1915, an order was entered in this court suggesting of record the death of John Dadie, Administrator of the estate of Thomas M. Smith, deceased, and that William C. Hartray, Administrator, etc., be substituted as appellee in lieu of the said John Dadie.

A reversal of the judgment of the Superior Court is urged upon two grounds:

1. That the verdict and judgment are against the manifest weight of the evidence.

2. That the trial court improperly admitted testimony as to a defect in the pavement of Elston avenue, other than the defect which caused the injury complained of.

The deceased, at the time in question, was driving in a southerly direction on Elston Ave., in the City of Chicago, a four mule team with a heavy wagon attached thereto. There were three witnesses to the accident, all of whom testified in behalf of the plaintiff. Their evidence tended to show that the accident occurred in the night time, and that as the mules reached the south cross walk of Armitage Avenue, where the latter street intersects Elston Avenue, the right front wheel of the wagon in question dropped into a deep hole in the pavement in Elston Avenue, at a point south of the center line of Armitage Avenue, causing the deceased to fall from his seat on the wagon to the street pavement, sustaining injuries which resulted in his death.

Fred Tiedge and Stanley Feist, two of the witnesses to the accident, did not testify at the first trial, but testified at the second and third trials of this case. Their testimony at the last hearing, as to the location of the hole in question, was that the right front wheel of the wagon dropped into a hole on the outside of and immediately adjoining the west rail of the south-bound street car track on Elston



since the latter was.

On November 7, 1910, an order was issued in this court suggesting of record the name of John Smith, Administrator of the estate of John W. Smith, deceased, and John William E. Harty, Administrator, etc., to be substituted as appears in list of the said John Smith. A reversal of the judgment on the above-mentioned point is urged in two grounds:

1. That the verdict was against the evidence, the weight of the evidence.
2. That the trial was improperly conducted because as to a defect in the payment of money, other than the above stated one being complained of.

The deceased, at the time he was killed, was residing

in a ten-story apartment on State Ave., in the city of Chicago, a four mile run with a heavy wagon between the city

There were three witnesses to the accident, all of whom

testified in behalf of the plaintiff. They all testified

to have seen the car which was killed in the city, and

that at the time the car was killed it was on the highway

between, across the latter street intersection, and

the plaintiff's car of the same in motion, and that it was

and that the car was killed in the city, and that it was

of the car was killed in the city, and that it was

to kill the car on the highway in the city, and that it was

sustained, and that it was killed in the city, and that it was

That the car was killed in the city, and that it was

to the plaintiff, and that it was killed in the city, and that it was

testified as the plaintiff's car was killed in the city, and that it was

testimony as the plaintiff's car was killed in the city, and that it was

in addition, and that the plaintiff's car was killed in the city, and that it was

dropped into a hole on the highway in the city, and that it was

the west rail of the street-car track and track on the highway

Avenue, which testimony, in that regard, <sup>was</sup> ~~is~~ at variance with the testimony of Mary Becker. Fred Tiedge and Stanley Feist testified that the wagon went into a hole in front of Paylor's saloon. Tiedge testified that "The man fell off to the Paylor way \* \* \*." The entrance to the Paylor saloon was on the south-west corner of Armitage and Elston Avenues. Mary Becker testified that, "The hole was right in front of Paylor's saloon \* \* \* inside of the south-bound track \* \* \*. He fell right straight in the front, mostly toward Paylor's saloon. \* \* \* he laid in the middle of the south-bound track." Stanley Feist did not testify as to the direction in which the body of the deceased fell. Five other <sup>Plaintiffs</sup> ~~of appellee's~~ witnesses corroborated the testimony of Tiedge and Feist as to the location of the hole in question, and that such condition had existed there during all of that winter. On the other hand, several other witnesses testified, in behalf of the city, that there was no hole at the place in question of the size and character testified to by appellee's witnesses.

The jury and the court below having seen and heard these witnesses testify were in a better position than this court to pass upon the credibility of their testimony. It is manifest that all of the witnesses to the accident testified in regard to the same hole in the street pavement. As to the negligence of appellant, it is immaterial whether the hole in question was immediately to the west or to the east of the west rail of the south-bound street car track on Elston Avenue. Such variance in the testimony of the witnesses goes solely to their credibility. After a careful review of the evidence, we are unable to say that the verdict in this case is against the manifest weight of the evidence.

Counsel for appellant urge that as the opinion





of this court in the former hearing disclosed that appellee did not produce upon the first trial Fred Tiedge and Stanley Feist, and as the testimony of Tiedge and Feist as to the location of the hole in question is wholly inconsistent with the testimony given, in that regard, by witnesses at the first trial, that the testimony of Tiedge and Feist is unworthy of belief. We are required to try the case on the record presented, and we have no right to look to the transcript in the former hearing to determine questions of fact in this case. As said by the Supreme Court in C. B. & D. R. E. Co. v. Lee, Administratrix, 87 Ill. 454, 461, "we may review the finding of the jury on the evidence, but only on the evidence they heard, and on which they based their finding. We have no right to look outside of this record to determine whether their finding was correct or incorrect."

The court did not err in admitting the testimony of Tiedge and Feist. Such evidence was clearly competent and the question of the credibility of these witnesses and the weight to be given their testimony was peculiarly within the province of the jury.

Finding no prejudicial error in the record, the judgment of the Superior Court will be affirmed.

JUDGMENT AFFIRMED.





544 - 20877

BENJAMIN M. LAWRENCE.  
Appellee.

vs.

NORTHWESTERN NATIONAL  
INSURANCE COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 449

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Benjamin M. Lawrence, the appellee, recovered a judgment of \$1500 against the Northwestern National Insurance Company, appellant, in the Municipal Court, in an action of the first class. The case was tried without a jury.

The action arose out of a claim for loss under a fire insurance policy by which appellant insured appellee in the sum of \$3000, on a two story frame dwelling in Lyons, Cook County, Illinois. The fire occurred July 28, 1912.

*Plaintiff*  
~~Appellee~~ filed sworn proofs of loss with appellant alleging the amount of the loss to be \$2492.20, which is the amount set forth in appellee's statement of claim. *Defendant*  
~~Appellant~~, in its affidavit of merits, confined the issues to acts and deeds which occurred after the fire, and predicated its defense upon fraud and false swearing in making the representations, and expressing the opinions appearing in the proofs of loss.

The policy of insurance contained<sup>ed</sup> this language: "This entire policy shall be void \* \* \* in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss." The policy required the insured to deliver the following instruments to the company:

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FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C. 20535

TO : DIRECTOR, FBI  
FROM : SAC, NEW YORK  
SUBJECT: [illegible]

1st L.A. 449

1. [illegible]

2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

6. [illegible]

- a. Complete inventory, stating the quantity and cost of each article and the amount claimed thereon,
  - b. Sworn statement setting forth the cash value of each item and the amount of loss; and,
  - c. If requested, verified plans and specifications of the building, fixtures or machinery destroyed or damaged.
- Plaintiff's*  
~~Appellee's~~ proof of loss included a plan certified

by him, showing a two story and basement frame building and a statement and schedule containing a list of material sufficient to erect a building of such dimensions with studding 24 feet high, including a maple floor covering the entire first floor thereof, birch doors with plate glass, and oak trim in the living and dining rooms, respectively. *Defendant* ~~Appellant~~ contends that the building destroyed by fire was one story in height with an 18 foot studding only, containing no hard wood trim nor birch doors with plate glass, and only the kitchen floor was of maple. *Defendant* ~~Appellant~~ further contends that much of the lumber used was old and second-hand, and the prices of material contained in such statement of loss are excessive. The plan and specifications included in the proofs of loss were made by a building contractor named O'Donovan, at the request of and upon information given to him by *plaintiff* ~~appellee~~, who certified that such plan and specifications were true and correct to the best of his knowledge and memory.

There was a conflict of evidence upon all of the issues of fact raised by the pleadings. One of *defendants* ~~appellee's~~ witnesses, Salomon, a building contractor, testified that the lumber prices seemed to be fair. The witnesses, in estimating the loss, gave opinions varying from \$1324 to \$3100, respectively. The finding of the trial court as to the amount of the loss is evidently based upon the opinions, in that regard, expressed by appellant's witnesses.



Complete investigation, including the following, was conducted by the FBI on the above-named subject and the results are as follows:

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*(continued from page 60)*

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... ..

To file your complaint to JAGTAP, a fee of \$100

1900-1901, 1902-1903, 1904-1905, 1906-1907, 1908-1909, 1910-1911, 1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 26

— 1997 —

1971-02-02 11:00 AM

unofficially. The findings of the study were not

At the time of the investigation, the following information was obtained from the records of the Bureau of the Census:

574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is contended, that as appellee sought to recover from appellant \$2492.20, and the finding of the trial court was for only \$1500, that the trial court should have found the policy void on account of fraud and false swearing.

"A discrepancy, even of very considerable proportions, between the amount stated by the insured in the proofs of loss and the value found by the jury does not conclusively establish fraud or false swearing, but it remains a question of fact whether the overvaluation was intentionally fraudulent or merely an error of judgment." Am. and Eng. Ency. of Law, (2nd ed.) vol. 13, 344. In Commercial Insurance Co. v. Friedlander, 156 Ill. 595, 598, the estimate in the proof of loss was \$9840. The jury returned a verdict of \$1277.80. It was urged this discrepancy was sufficient to establish a fraudulent overvaluation within the meaning of the policy, but the court held: "The mere fact that the assured, in the proofs of loss, has made an over-valuation of the property destroyed will not defeat a recovery on the policy for the actual loss sustained. If the assured, in making proofs of loss, acts in good faith, in the honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such overvaluation cannot be held to be fraudulent, and it will not defeat a recovery," citing, (Rockford Ins. Co. v. Nelson, 75 Ill. 548; Franklin Fire Ins. Co. v. Vaughan, 92 U. S. 516.)

The question of fraud is one solely of fact, (Home Ins. Co. v. Bendenhall, 164 Ill. 458, 469,) and has been settled adversely to appellant.

The trial judge was in a much better position than this court to pass upon the credibility of the witnesses and to determine the weight to be given to their testimony.





Fraud is never presumed, and the burden of establishing fraud is upon the party alleging it. Appellant does not complain of the amount of the judgment and relies wholly upon the allegation of fraud in seeking a reversal here. We are of the opinion that fraud has not been established, and that the judgment of the Municipal Court should be affirmed.

AFFIRMED.

There is no other person named [redacted] who has been identified as having been involved in the activities of the [redacted] group.

The [redacted] group is a small, private organization which is active in the [redacted] area. It is not known whether or not the [redacted] group is affiliated with the [redacted] group.

The [redacted] group is a small, private organization which is active in the [redacted] area. It is not known whether or not the [redacted] group is affiliated with the [redacted] group.

ILLINOIS SMELTING & REFINING CO.,  
Defendant in Error,

vs.

HAROLD E. HORTON and GEORGE H.  
HORTON, doing business as CHICAGO  
ALUMINUM CASTINGS CO.,  
Plaintiffs in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 451

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for a balance claimed to be due for aluminum sold defendants. Upon trial by the court it had judgment for \$297.07.

The evidence showed that there was a dispute between plaintiff and defendants concerning the weights of the aluminum delivered; that one of the defendants, Harold E. Horton, had a talk with the president of plaintiff concerning this, and it was agreed that men would be sent by the plaintiff to weigh up the metal providing defendants would at once pay on the basis of the weights thus ascertained. Plaintiff sent men to defendants' works who weighed the metal. The next day a bill was presented by plaintiff to defendants, on which the shortage in weights found by plaintiff's men had been deducted, leaving a balance due of \$1,606.43. The defendants thereupon gave a check for this amount and the statement was marked paid. The check given was subsequently collected by plaintiff. The evidence further tended to establish that the weights shown in the statement were arrived at after carefully weighing and checking the metal and were in fact the correct weights. Plaintiff introduced no testimony whatever tending to prove

ILLINOIS DEPARTMENT OF REVENUE  
TOLSONMAN IN TROT

TO THE

REVENUE DEPARTMENT

IN WASHINGTON

RECEIVED BY THE DEPARTMENT OF REVENUE  
WASHINGTON, D.C. 20540  
ALLEGEDLY IN WASHINGTON  
PLAINTIFF'S IN WASHINGTON

1971.4.431

MR. TOLSONMAN IN TROT

DELIVERED THE OFFICE OF THE

Plaintiff's briefs and for a statement claimed to be  
due for aluminum sold and delivered. Upon trial by the court  
it had judgment for \$100.00.  
The evidence showed that there was a dispute be-  
tween plaintiff and defendant regarding the amount of the  
aluminum delivered; that one of the witnesses, namely,  
Horton, had a false and untrue statement of plaintiff's work-  
ing time, and it was shown that the amount of work done  
the plaintiff is equal to the actual working time shown  
which is once pay on the basis of the actual time shown  
worked. Plaintiff's brief and the defendant's brief were  
the same. The court gave a full and complete judgment of plaintiff  
to defendant, on which the defendant is entitled to  
plaintiff's work and time shown, namely a sum of due of  
\$1,000.00. The defendant's brief gave a sum of due of  
amount and the statement was worked out. The court gave  
was subsequently collected by plaintiff. The evidence  
further tended to establish that the witness shown in the  
statement was a false and untrue statement of plaintiff's  
working time and was in fact a false statement.



that these weights were not correct.

Under the above circumstances plaintiff was not entitled to recover, for either of two reason: (1) There was a full accord and satisfaction. We have a dispute between the parties and a tender of payment in full and its acceptance. (2) The evidence established that the amount of aluminum delivered was paid for; there was no evidence of any deliveries for which defendants did not pay.

For the reasons above indicated the judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

that these weights were not correct.

Under the above circumstances Plaintiff was not entitled to recover, for either of two reasons: (1) There was a full accord and satisfaction. In fact a discharge between the parties and a tender of payment in full and its acceptance. (2) The evidence established that the amount of aluminum delivered was paid for; there was no evidence of any deliveries for which deliveries did not pay.

For the reasons above stated the judgment is reversed and judgment of full payment with interest is this court.

REVEREND AND TRUSTED

35 - 21277

JOHN D. BROGHAN,  
Plaintiff in Error,

vs.

JAMES J. HARRINGTON, Jr.,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 454

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review the record in an action for deceit, to recover money expended by plaintiff in redeeming from a sale of property for an unpaid special assessment which plaintiff says should have been paid by defendant. Upon trial the court found the issues against the plaintiff.

Plaintiff, seeking a reversal in this court, in his brief and argument refers to certain papers and documents which were received in evidence and considered by the trial court, but none of these documents appears in the abstract of record, either in whole or in part or in substance. This court will not search the record to find grounds for reversal. The judgment might properly be affirmed on the ground that it will be presumed the documents were sufficient to support the conclusion reached by the trial court.

<sup>4</sup>  
It seems that plaintiff and defendant, each owning certain lots, agreed to make an exchange; that on August 25, 1913, they met at the office of defendant to close the deal; that defendant produced an opinion of title from the Chicago Title & Trust Company showing that his property was subject to a special assessment for street paving, confirmed February 29, 1912, payable in five annual installments. Plaintiff

Plaintiff in Error

VI

JAMES L. WASHINGTON, JR.,  
Defendant in Error

1st A. 454

W. WASHINGTON, JR. vs. J. WASHINGTON, JR.

Plaintiff in Error vs. Defendant in Error

This writ of error brings in review the record in  
an action for breach of contract, to recover money expended by plaintiff  
in redeeming from a sale of property for an unpaid special  
assessment which plaintiff says he did not have paid by  
himself. Under the record found in the transcript  
the plaintiff.

Plaintiff, seeking a reversal of the verdict, in  
his brief and argument refers to certain records and documents  
which were received in evidence and introduced in the trial  
court, but none of these documents appear in the transcript of  
the trial, which is what he is now on in evidence. This  
court will not search the record in this regard for the correct  
The judgment might properly be affirmed on the ground that  
it will be presumed the documents were introduced in evidence  
the conclusion reached by the trial court.

It seems that plaintiff was concerned with certain  
certain facts, which he made an exhibit; that he made an  
exhibit, they had at the office of defendant in error; that  
that defendant produced an exhibit in error from the  
file of Trust Company, showing that the property was subject  
to a special assessment for street paving, notwithstanding  
22, 1927, records in the same document. Plaintiff



testified that defendant said that the former owner of his lots had paid the first installment of the special assessment, and that defendant would get the receipt from him and turn it over to plaintiff. There was evidence tending to corroborate plaintiff. On the other hand, defendant denied making such statement, and there was testimony tending to corroborate him. The deal was closed, defendant giving plaintiff a warranty deed of that date conveying the property to plaintiff, "subject to all taxes and assessments levied for the year 1913 and to any unpaid special taxes or special assessments." Plaintiff <sup>claims</sup> ~~says~~ that as a matter of fact this first installment of the special assessment had not been paid, and that after he acquired title the property was sold therefor and he was obliged to and did deposit with the county clerk \$116.67, the amount necessary to redeem from this sale. Plaintiff <sup>claims</sup> ~~says~~ that by defendant's false representation, knowingly made, he induced plaintiff to act upon it to his loss and injury. B

As we have indicated, the testimony as to the making of any representation concerning the first installment of the special assessment was in conflict, and we could not say that the court was clearly wrong in failing to find that the preponderance tended to support plaintiff's contention as to what occurred.

It does appear that defendant at this meeting of August 25th did say that he had bought the property about five months before and had received a guaranty policy from the Chicago Title & Trust Co. which showed a clear title except as to the special assessment. Furthermore, the opinion of title of the Chicago Title & Trust Co. which plaintiff and his attorney had before them at the time is dated August 21, 1913, and it states that the title is in the defendant, subject to the taxes for 1913, and the five installments of the



testified that defendant said that the former owner of this  
 this had paid the first installment of the purchase money,  
 and that defendant said that the purchase price was \$1000  
 is very to plaintiff. That was the amount of the  
 consideration actually. On the other hand, defendant alleged  
 having been advanced, and that was the amount of the  
 consideration now. The fact that defendant, defendant alleged  
 plaintiff a warranty deed of that date covering the property  
 to plaintiff, subject to all taxes and assessments falling  
 for the year 1911 and to any and all taxes and assessments  
 assessments. Plaintiff says that as a matter of fact and  
 these installments of the purchase money had not been  
 paid, and that after he executed the deed to plaintiff he  
 thereon and he was obliged to pay the taxes and the  
 about, about 1911, the amount of the taxes and the  
 this sale. Plaintiff says that he delivered to the  
 representative, whereby made, he is not satisfied in fact  
 name is to be lost and money.

As we have indicated, the evidence as to the making  
 of any contract, or agreement, the first installment of the  
 special agreement was in conflict, and we could not say that  
 the deed was validly given in full in 1911 and  
 consideration paid to plaintiff's satisfaction as to  
 when occurred.

It does appear that defendant at this point of  
 August 25th did say that he had paid the purchase price and  
 money before and had received a receipt for the same  
 through the Chicago Title & Trust Co., which issued a receipt for the  
 as to the special agreement. Nevertheless, the giving of  
 title of the Chicago Title & Trust Co. was in conflict with  
 his testimony that before that time he had paid money to  
 1911, and it appears that for this is the amount, and

special assessment in question. In view of the information given by these documents, we do not think it is reasonable to say that plaintiff relied upon a verbal statement that the first installment had been paid over five months before; at least, the opinion of title should have put plaintiff upon notice as to the fact. It is not denied that defendant stated at the time that he would convey the title which he had as shown by this opinion.

By the warranty deed plaintiff took title subject to all taxes and assessments levied for the year 1912 and to all unpaid special assessments. It is a familiar rule that a written contract executed between parties supersedes all prior negotiations, representations and agreements upon the same subject.

We see no reason to disturb the judgment of the trial court, and it is affirmed.

AFFIRMED.



HERBERT F. BRANDENBERG,  
Defendant in Error,

vs.

PETER KLEHR,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 459

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff, riding his motor bicycle, collided with defendant's automobile, operated by defendant, in Jackson Park, Chicago. Plaintiff was injured and brought suit against defendant for damages. Upon trial by the court he had judgment for \$450.

Defendant relies for reversal upon two alleged errors, the first of which is stated in his brief as follows: "1. The failure and refusal of the court to hold that the plaintiff was guilty of contributory negligence and not entitled to recover as shown by the various rulings of the court." It would serve no useful purpose to narrate the evidence. The case seems to have been fairly tried by the trial court and the testimony carefully weighed. The judge even went so far as to visit the scene of the collision and make a personal inspection of the surroundings. The court could reasonably believe that while plaintiff was properly riding upon the right side of the road the defendant improperly crossed over from his right to the left side of the driveway. We see no reason to disagree with the conclusion that the plaintiff was not guilty of any negligent conduct which caused or contributed to the accident.

The second error assigned is: "2. The failure







and refusal of the court to hold that the defendant was guilty of negligence as shown by the various rulings of the court." Taking this language literally, the obvious answer is that the court did not fail and refuse "to hold that the defendant was guilty of negligence." If counsel intended to say that the court should have found that defendant was not guilty of negligence, it is a sufficient answer to say that in our opinion the conclusion of the court that the defendant was negligent was amply justified under the evidence.

The judgment is affirmed.

AFFIRMED.

and refusal of the court to hold that the defendant was guilty of negligence as shown by the various rulings of the court. Taking this language literally, the court seems to say that the court did not fail and refuse "to hold that the defendant was guilty of negligence." It cannot be said that the court should have found that defendant was not guilty of negligence, it is a sufficient answer to say that in our opinion the determination of the court that the defendant was negligent was fully justified under the facts.

The judgment is affirmed.

NOTES.

188 - 21581

JOHANNA GERTZ,  
Defendant in Error,

vs.

CLOVER LEAF CASUALTY  
COMPANY,  
Plaintiff in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 462

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

The Mutual Health & Accident Association, afterwards succeeded by the Clover Leaf Casualty Company, the defendant, issued what is termed a "Health and Accident Policy" to Gus Gertz, in which his wife, Johanna Gertz, plaintiff, was named as beneficiary. On November 20, 1913, Gertz died. Plaintiff brought suit for \$1,000, the amount payable under the terms of the policy in the event that the death of the insured was caused through accident. Upon trial by the court she had judgment for that amount.

It is urged by the defendant that no accident was proved and that the insured died from disease. The evidence of an accident is hardly convincing. <sup>\* H. Appel</sup> ~~A witness testified~~ that while ~~the insured was loading coal from a pile into a~~ <sup>full</sup> ~~wagon some lumps from the pile rolled down, striking Gertz on the foot or leg, that at the time he gave no exclamation or indication of receiving injury, but continued on at his work,~~ <sup>any</sup> and neither then nor thereafter while delivering the load of coal or going home with the witness did Gertz say anything <sup>relevant</sup> about any coal falling upon him. ~~As this~~ <sup>W</sup> ~~witness was working on the opposite side of the wagon, from Gertz, it is difficult to believe that he could see coal strike Gertz on the foot~~





or leg, ~~as testified to by~~ <sup>testified</sup> the physician, the cause of death was diabetes mellitus, accompanied by a gangrenous condition of the foot incident to diabetic ulcer. It was amply proved that the insured had suffered for a long time from the disease of diabetes, and that for ~~two or more~~ <sup>several</sup> years before his death ~~he~~ <sup>the ulcer being</sup> had a diabetic ulcer of the foot, which ~~was~~ <sup>was</sup> two inches broad and an inch long, exposing bones one-half inch to one inch deep. ~~The insured had during this time frequently~~ <sup>insured while</sup> complained about his foot, ~~to a number of acquaintances.~~ A few days before his death some of his fellow workmen called upon him, and in ~~response~~ to a suggestion that ~~perhaps~~ his foot hurt because coal dropped on it, ~~he~~ Gertz replied, "No, I don't know nothing about coal dropping on it," and, again, he said, "I don't remember of any coal of any kind falling upon my leg." ~~At this time, apparently,~~ <sup>then apparently</sup> ~~he was in full~~ possession of his ~~mental~~ faculties. ~~After giving full consideration to the evidence tending to support plaintiff's theory of accident, we would be justified in finding that the insured did not come to his death through accidental means.~~

We prefer, however, to base our conclusion on two other grounds, either of which is sufficient to require a reversal of the judgment.

Plaintiff's claim, as made in her statement of claim and argued by her counsel, is that the insured died from blood-poisoning or infection through the foot, caused by the injury received from the falling coal. Even if we assume this to be true, liability for death from such a cause was expressly excepted by the terms of the policy. ~~The policy insured against "Bodily Injuries, effected directly and independently of all other causes and solely through external, violent and accidental means." It also contained these~~



I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

provided that, "In the event of \* \* \* injury due wholly or in part to or resulting directly or indirectly in or from \* \* any disease or bodily infirmity, or \* \* \* infection in any form or manner \* \* \* The Association shall not be liable." A further provision is, "Disability resulting from \* \* \* abscesses, ulcers, and blood-poisoning, are classified as sickness, and are covered only under the sick benefit clauses of this policy." <sup>+</sup>In view of these provisions it is clear that plaintiff cannot recover the accident death liability for the death of the insured from blood-poisoning and infection. The language is too clear to require construction by the court.

We are of the opinion that there was a settlement between the parties, which is a bar to any further recovery on the policy. <sup>1</sup>The policy covered a variety of contingencies, with variant amounts to be paid, <sup>including</sup> it ~~covered~~ not only death from accident, but loss of hands, feet, etc., indemnity while disabled from accident, partial disability, illness indemnity, and some eight or nine other contingencies, including death from sickness. It <sup>appeared</sup> ~~was proved~~ that after the death of the insured, <sup>deceased</sup> plaintiff demanded payment ~~under~~ <sup>of</sup> the "illness indemnity" provision of the policy, ~~and that~~ <sup>as well as</sup> this was paid to her, and she ~~was also paid~~ the amount payable under the provision for payment "if the death of the member results from sickness"; and she signed a receipt ~~for the amount thus paid~~ "in full settlement of all claims." ~~is find no evidence of fraud in this settlement.~~ Plaintiff ~~seems to have understood what she was doing, and~~ was assisted by her daughter, an intelligent girl twenty years of age. <sup>2</sup>Cases cited by plaintiff's counsel are not in point. This is not a case where there was a certain fixed sum due, and a settlement for a less amount. As we have indicated above, the amount payable under the policy depended



upon the contingencies existing and the facts relating to the insured. Plaintiff was in a better position than anyone else to know the facts concerning the illness and death of the insured. She was competent to settle with defendant upon the basis of her opinion and knowledge of these facts. Having done so, she cannot now assert another claim.

It might also be added, in view of the provision of the policy that disability resulting from ulcers and blood-poisoning should be classified as sickness and covered only under the sick benefit clauses of the policy, that we do not see how plaintiff properly could have made claim for benefits other than those which were paid to her.

Upon the record plaintiff is not entitled to recover, and the judgment is reversed without remanding the cause.

REVERSED.



the results of his studies and knowledge of these birds. He also  
the interest. The one important result was that the birds were  
also to know the facts concerning the life and habits of  
the interest. It is difficult to see how it was possible to

It might also be added, in view of the provisions of the policy that disability benefits from private and public pension funds be classified as retirement or deferred pay under the social benefit insurance of the policy, that we do not see how disability payments could have been made under the Social Security Act.

and the judgment is reversed with no remittitur of the costs.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26



STEFAN TYRAKOWSKI,  
Appellant,

vs.

HARD A. CONNELL,  
Appellee.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

191 I.A. 471

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment for the defendant entered on a verdict of not guilty in an action on the case for personal injuries sustained by plaintiff through the alleged negligence of the defendant. The defendant, Connell, was driving his automobile in the right-hand street car track in Milwaukee avenue. Plaintiff started to cross ~~the street in a diagonal~~ <sup>direction</sup> between two street intersections. The distance between the right-hand rail of the right-hand track and the curb <sup>was</sup> is ten feet five inches. Plaintiff testified that he looked <sup>both ways</sup> to the right and to the left and did not see the car, and <sup>was</sup> did not know that there was one on the street until he was struck. Defendant testified that he saw plaintiff when he stepped ~~down~~ <sup>away</sup> from the curb; that the car <sup>was</sup> was then fifty feet <sup>away</sup> from him and going at the rate of ten miles an hour; that defendant <sup>was frightened</sup> sounded the horn of his car five or six times, and <sup>he</sup> when he saw that plaintiff paid no attention to <sup>his</sup> the horn he applied the brakes and locked the rear wheels of the car, but the track was wet and the car slid on the rails and struck plaintiff. \*

The contention that the Court erred in refusing to admit a paper written in court by defendant at the request of plaintiff's counsel, as evidence tending to impeach defendant's testimony that he did not write a certain other

WITNESSES:  
 JAMES J. [illegible]  
 [illegible]  
 [illegible]  
 [illegible]  
 [illegible]

1811.A.411

THE COURT: [illegible]

This report of [illegible]

The defendant entered on a [illegible] of [illegible] in [illegible]  
 time on the day for [illegible] [illegible] [illegible] [illegible]  
 [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

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[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

paper admitted in evidence, is without merit. The genuineness of handwriting cannot be proved or disputed by allowing the jury to compare it with other writing of the party proved or admitted to be genuine unless the writing with which it is sought to compare that claimed as not genuine is properly in evidence and pertinent to the case.

Jumpert v. The People, 21 Ill. 407;

Brobston v. Cahill, 64 id. 356.

The jury were fully instructed as to the law governing the case, and it was not error to refuse plaintiff's first instruction.

Our conclusion from the evidence in the record is that the question of whether defendant was guilty of negligence in running his car, and the question whether the plaintiff was guilty of contributory negligence, are both questions of fact for the jury, on which their verdict is conclusive.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

after which in evidence, as witness, the defendant  
 of considerable amount he found as witness of himself the  
 long to compare it with what was said of the party before  
 as related to the person named the witness who said it  
 is sought to compare that witness of the witness is not  
 with in evidence and evidence to the witness

Exhibit A. See Exhibit A. See Exhibit A.

Exhibit B. See Exhibit B. See Exhibit B.

For the first time, the witness is not the

concerned the case, and is not the witness to the case.

With a list of witnesses.

For the first time, the witness is not the

is not the witness of the case, and is not the witness to the case.

negligence in turning the case, and the witness is not

the plaintiff was not the witness to the case, and is not the witness to the case.

with questions of fact for the jury, and is not the witness to the case.

is conclusive.

Nothing is known in the case, and is not the witness to the case.

is optional.

Exhibit.



ANDREWS ALLEN & JOHN A. GARCIA,  
copartners, and ALLEN & GARCIA  
COMPANY, a corporation,  
Defendants in Error.

vs.

ARTHUR H. SWETT,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 475

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

<sup>A</sup>  
~~This~~ suit was brought January 13, 1914, by  
Allen and Garcia, copartners as Allen & Garcia, against  
A. H. Swett. March 16, 1914, it was ordered that all  
papers and proceedings be and they thereby were amended by  
making Allen & Garcia Company, a corporation, co-plaintiff  
in the action. Garcia is a mining engineer, and in the *was*  
*by* ~~summer of 1913 Swett asked him to examine coal land in~~  
Iowa and make a report. He did so, and charged for his  
services and expenses \$338.20, and for *which the* ~~this~~ sum plaintiffs  
had judgment, ~~to reverse which Swett prosecutes this writ~~  
~~of error.~~ The Lucas Coal & Supply Co., a corporation of  
which Swett was president and treasurer and a director, was  
the owner of the mine, and the contention of plaintiff in  
*was* error ~~is~~ that the Lucas Company and not Swett *was* ~~is~~ liable  
for the services rendered. <sup>B</sup> The question was one of fact  
for the trial Court. The burthen of proof was on the  
plaintiffs to prove that Swett was liable. Our conclusion  
from a careful examination of the evidence is that the Court  
might from the evidence properly find that Swett was liable,  
and that the finding of the trial Judge ought not to be dis-  
turbed. It does not appear that any objection on the ground  
of misjoinder of plaintiffs was made in the Municipal Court,  
and the propriety of the joinder of plaintiffs is not ques-



ARMOUR & JOHN A. ARMOUR,  
SOUTHERN, AND ALICE A. ARMOUR  
COMPANY, INCORPORATED,  
MEMPHIS, TENNESSEE.

vs.

ARMOUR & JOHN A. ARMOUR,  
SOUTHERN, AND ALICE A. ARMOUR  
COMPANY, INCORPORATED.

STATE OF TENNESSEE,  
COUNTY OF \_\_\_\_\_.

1911 A-475

BEFORE ME, the undersigned authority, on this \_\_\_\_\_ day of \_\_\_\_\_, 1911.

Personally appeared \_\_\_\_\_, known to me to be the person whose name is subscribed to the foregoing petition.

and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this \_\_\_\_\_ day of \_\_\_\_\_, 1911.

Notary Public for the State of Tennessee.

My commission expires \_\_\_\_\_.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 1911.

Notary Public for the State of Tennessee.

My commission expires \_\_\_\_\_.

Notary Public for the State of Tennessee.

My commission expires \_\_\_\_\_.

Notary Public for the State of Tennessee.

My commission expires \_\_\_\_\_.

Notary Public for the State of Tennessee.

tioned by any assignment of error, nor is it argued in the brief of plaintiff in error except in the reply brief, and therefore must be considered as waived.

The record is in our opinion free from reversible error, and the judgment is affirmed.

AFFIRMED.

tioned by our assignment of error, nor is it argued in the  
 brief of appellants that error should be held to exist, and  
 therefore that an assignment of error should be made.

The record is in our opinion free from error.

Very respectfully, your obedient servant,

Wm. H. H. H.

11- 21134

JAMES D. WILLIAMS doing  
business as Williams Grain  
Company,

Defendant in Error,

vs.

JOSEPH KRUG,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 483

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out by defendant to reverse a judgment of \$128.87 against him on a claim that plaintiff sold and delivered to defendant certain oats, alfalfa, grain and bran. The trial was before the court without a jury.

A There was no personal equation between the parties to the transaction nor any prior dealings between them. The order on which the oats, etc., was delivered was by telephone, but the person who gave the order, if any was given, remains unidentified. No attempt was made to verify the order, but the oats, bran, etc., were delivered not to defendant but at a barn near 3927 Prairie Avenue, Chicago, where three other Krugs - William, George and Harry - kept horses. The receipts for the oats offered in evidence are signed neither by defendant nor by any person authorized by or acting for him. Furthermore, the testimony demonstrates that at the time the oats, grain, etc., were delivered by plaintiff, defendant had a contract with another firm for these commodities, which were supplied by said firm to defendant regularly during that time. B

Sending bills to a person with whom the sender

111

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has no contractual relation or dealings has no value as evidence, lacks probative force and establishes no fact. If defendant actually received the bills claimed to have been sent to him by plaintiff, he was not thereby charged with any duty concerning them. Had there been any contractual relationship between the parties, the receipt of such bills, without objection, might have ripened into an account stated, but such is not the situation between the parties to this action.

It looks very much as if some of the quartet of Krugs had received the merchandise of plaintiff in suit and that the same had been consumed by the horses of one or more of them. In all good conscience plaintiff should receive payment from whoever actually received and availed of such commodities, but these equitable considerations will not justify this court in sustaining a judgment which lacks proof of any fact which in law is necessary to support it. The law affords no relief for simply moral claims as distinguished from legal claims. Plaintiff was over-confiding in failing to know the person with whom he was dealing and in not verifying the order before delivering the goods.

There is no evidence in this record sustaining plaintiff's claim and the judgment of the Municipal Court is reversed and one of nil cariat entered in this court.

REVERSED WITH JUDGMENT OF NIL CARIAT.



164 - 21192

JOSEPH GUZIK,  
Defendant in Error,

vs.

MALGORZATA TOMCZAK and  
JOHN TOMCZAK,  
Plaintiffs in Error.

WRIT TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 484

MR. JUSTICE HELDOW DELIVERED THE OPINION OF THE COURT.

Plaintiff occupied the premises 8701 Marquette avenue, Chicago, paying rent to defendants, under a lease expiring October 3, 1914. Defendants notified the plaintiff prior to the expiration of the lease that they would expect prompt surrender of possession, as they had made a lease to another tenant, the term of which commenced on November 1, 1914, and that if plaintiff remained in possession after the expiration of his lease, rent would be charged at the rate of \$75 per month; that defendants needed possession promptly in order to make necessary repairs for the new tenant before his term commenced. There was no further negotiation for a new lease or for an extension of the old term between the parties, and no new lease or extension of the old term was made. On October 7, 1914, defendants interfered with plaintiff's possession by commencing the making of certain repairs. Plaintiff quit business on that day and three days thereafter vacated the premises and surrendered the same to defendants. On October 29, 1914, plaintiff sent defendants a post office order for \$75, which was returned, and he claims that through Becker, his agent, he tendered the same in currency to defendants earlier in the same month. The trial was before court and jury and resulted in a verdict and judgment for \$125, and defendants seek this review and ask a reversal.





Plaintiff has failed to favor the court with any brief. It is urged for reversal that the court erred in its instructions to the jury. One instruction was based upon the theory that the lease of plaintiff was extended. We do not so gather from the evidence. Defendants notified plaintiff in writing that they expected a prompt surrender of possession and threatened to penalize plaintiff by charging him rent at the rate of \$75 a month if he held over. This was twice the amount of rent that plaintiff was paying under his lease. But this did not constitute an agreement either for a new lease or an extension of the term of the existing lease. Plaintiff did not intimate for how long he would accept a new term. Neither did defendants intimate how long they would allow plaintiff to remain as tenant after the expiration of the existing lease. Furthermore, defendants had notified plaintiff in writing that they had leased to a new tenant for a term commencing the first day of the succeeding month of November. The fact that a new lease had been made took away from defendants the power to make another lease to plaintiff or any one else. A tender of the \$75, the amount of the threatened penalty in the notice to surrender possession, in no way constituted a meeting of the minds of the parties upon a new term. A contract to be binding must be definite in all its provisions. There was neither an offer nor an acceptance of a new term. Plaintiff voluntarily moved out of the premises upon defendants starting to make the repairs and about two weeks prior to sending to defendants the \$75 post office order. It therefore follows that the instruction of the court to the jury that the lease of plaintiff expired October 3, 1914, <sup>The court instructed the jury</sup> and that it was plaintiff's duty to "vacate said premises at that time unless you



[illegible]

find from the evidence that he made some arrangements with defendants whereby he was to retain possession after the expiration of said lease," ~~was erroneous.~~

For the errors indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

The first two witnesses have been examined and their  
 statements are as follows: The first witness, who is a  
 resident of the town of ... has been examined and his  
 statement is as follows: The second witness, who is a  
 resident of the town of ... has been examined and his  
 statement is as follows: The third witness, who is a  
 resident of the town of ... has been examined and his  
 statement is as follows:

42 - 21346

EDWARD H. SHERBURNE,  
surviving plaintiff,  
Appellant,

vs.

CHARLES J. MCGUIRE,  
Appellee.

))  
)  
) APPEAL FROM SUPERIOR COURT  
)  
) OF COOK COUNTY.  
)

197 I.A. 486

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is an action of trespass against defendant for breaking the close of plaintiff and digging and carting away the soil from his land.) Defendant admitted the trespass and the carrying away from plaintiff's land of fifteen wagons of soil, containing two cubic yards per wagon, while plaintiff insists that defendant carried away two hundred loads of soil. ~~It is not disputed that~~ <sup>admitted</sup> The value of such soil ~~at the time it was removed from plaintiff's land was~~ \$1.14 per cubic yard.

A trial before court and jury resulted in a verdict and judgment for \$34.20; plaintiff, being dissatisfied, brings the record to this court for review.

The questions involved are largely of fact. It is firmly settled that this court will not disturb a judgment resting upon the verdict of a jury unless it is apparent from all the evidence that the verdict is clearly contrary to its preponderating force, or that the rulings of the court in procedure and in its instructions were calculated to mislead the jury to the complaining party's injury.

The trial was attended with more than one error in procedure and some of the instructions were, in unimportant particulars, faulty. There was an amount of levity and flip-





pant conduct on the part of counsel for defendant in the course of the trial, which was entirely unwarranted and ill became the occasion. The trial of a suit at law is always a serious matter and should be conducted with the proprieties of the court room ever in mind. Counsel for defendant has continued his flippant treatment of the case in the brief which he has filed in this court. Such conduct does not meet with our approval.

The paramount question in issue is the amount of soil removed and its value. The jury evidently gave more credence to the testimony of the witnesses for defendant than to that of the witnesses for plaintiff. This was within the power vested in them by law. A review of the evidence convinces us that the testimony of plaintiff was insufficient to sustain his contention that two hundred loads of soil were removed by defendant from the land of plaintiff. The jury evidently paid little attention to the testimony of the witness who kept tab by marks on the outside of her house of the loads removed by teams, whether the teams were those of defendant or others, which marks were afterwards somewhat obscured by a coat of paint. The number of loads removed was not before the jury for determination, but the amount of soil which defendant had removed. We think the jury were justified from all the evidence in finding that defendant did not remove from plaintiff's land more than thirty cubic yards of soil.

It is urged that the court erred in refusing to admit in evidence Section 1495 of the Revised Municipal Code of Chicago, set out in the declaration. The ordinance is penal. It provides for a fine of not less than five nor more than fifty dollars for each offense of unlawfully taking away earth from the land of another without first obtaining



the owner's consent. It is sufficient to say that the action was not brought under the ordinance for the penalty therein provided. The testimony that defendant obtained a permit to take away the soil which he removed was immaterial, as Cruikshank, from whom defendant claims he obtained the permit, was not proven to be the owner of the land from which the soil was pilfered. The admission of this testimony was, however, harmless error, as it in no way affected the question of the amount of soil taken by defendant. Moreover, the point was covered in an instruction given to the jury at the instance of plaintiff. The fact that some of the defendant's employees were arrested for purloining soil from the land of plaintiff was not a fact pertinent to the issues involved in the suit, and if admitted could serve no good purpose. Proof of the fact that men who were not servants or agents of defendant dug and carted away soil from the land of plaintiff was admissible to rebut any inference that might otherwise be indulged that such men were acting for defendant and that defendant would therefore be chargeable with the soil so removed.

Complaint is made of improper remarks made by counsel in his closing argument to the jury. Some of them were improper and should not have been made. While counsel objected at the time by simply saying "I object," he failed to press for the ruling of the court. At the conclusion of the argument of counsel for defendant there is noted an "exception by plaintiff to each and every part of the argument of defendant's counsel." This was of no avail as an exception to the whole or any part of the argument. Objections must be specific so that the court may be able therefrom to rule upon the language specifically objected to. A general exception at the end of the argument is insufficient.





We are unable to say, after a careful examination of the instructions about which plaintiff complains, that any one of them is so inaccurate as to have had the effect of misleading the jury on the crucial question before them for solution, namely, the amount and value of the soil removed by defendant from plaintiff's land. There was a sharp conflict in the evidence and the giving of the instruction concerning the veracity of the witnesses, etc., was therefore not improper. It is in the form approved by our courts. We think the jury were sufficiently instructed on the law of the case and on all material matters properly before them for consideration. The jury were fully instructed at the instance of plaintiff as to his theory of the case, and the modification by the court of plaintiff's instructions Nos. 3 and 4 was without error.

The errors in this record do not so affect the merits of the case as to justify a reversal of the judgment of the Superior Court, and it is therefore affirmed.

AFFIRMED.





49 - 21417

WALTER KATZOFF,  
Defendant in Error,

vs.

MORRIS GOODMAN,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 488

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is a writ of error calling for our review of the record of the Municipal Court, in which a judgment upon the finding of the trial Judge was entered against defendant and in favor of plaintiff for \$503.50.

Plaintiff claimed and proved that he had an agreement with the defendant for the payment to him by defendant of ten cents a yard for 5.35 yards of woollens which plaintiff, as a broker, had negotiated with Sturm Schiller & Company to sell to defendant. Plaintiff introduced defendant to Sturm Schiller & Company and rendered services in procuring this Company to sell to defendant the woollens above mentioned. There is a sharp conflict in the evidence as to whether plaintiff rendered any service to defendant in this transaction or whether defendant promised to pay the compensation demanded. The defendant contends that if there was any understanding concerning the transaction, it was to the purport and effect that if defendant could buy the woollens for forty cents a yard, he would then pay plaintiff ten cents a yard brokerage; that as a matter of fact defendant paid fifty-seven and one-half cents a yard for the woollens.

The evidence of the plaintiff uncontradicted is sufficient to sustain the judgment. We will therefore assume that the trial Judge gave credence to the evidence



of plaintiff and was not persuaded of the verity of the evidence of defendant. The advantages of the trial Court were superior to ours in judging of the weight of the evidence and as to its preponderating force. The witnesses came under the personal observation of the trial Judge, while our review is confined to the evidence contained in the record, without the added advantage of seeing and hearing the witnesses. There are no errors of procedure affecting the merits of plaintiff's claim.

The same weight must be accorded the finding of the trial judge as is given to the verdict of a jury. Notwithstanding plaintiff has failed to furnish any brief on this hearing, we see no reason for disturbing the judgment of the Municipal Court, and it is affirmed.

AFFIRMED.





120 - 21510

CITY OF CHICAGO,  
Defendant in Error,

vs.

HENRY JACOBI,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 493

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was arrested and convicted on a complaint charging him with violating Section 2012 of the Revised Municipal Code of Chicago and on the verdict of a jury was fined \$200. Defendant seeks a review of the judgment entered on this verdict and asks a reversal.

Defendant filed his petition for a change of venue, which the court denied. Various errors are assigned upon the record, but in the condition of the record before us, the law will not allow this court to consider any of them.

There is nothing before us but the statutory record. This does not preserve for our consideration the rulings of the court upon the motion for a change of venue or any of the other motions made, the evidence of which must be preserved by a bill of exceptions. The fact that they were copied into the statutory record is not sufficient. Heacock v. Hosmer, 109 Ill. 245.

Exceptions to the rulings of the court which appear in the common law record, but are not preserved by bill of exceptions, are not a part of the record and errors assigned thereon cannot be considered by the reviewing court. Grand Pacific Hotel v. Pinkerton, 217 Ill. 61.

The rulings of the Municipal court on a petition for a change of venue are not before the reviewing

100 - 1010

CITY OF CHICAGO,  
IN SENATE,  
JANUARY 1, 1901.  
REPORT OF THE  
COMMISSIONER OF THE  
SCHOOL BOARD.

100 - 1010

THE BOARD OF EDUCATION OF THE CITY OF CHICAGO.

The Board of Education of the City of Chicago, in its report to the Board of Aldermen, for the year ending June 30, 1900, has the honor to acknowledge the receipt of the report of the Superintendent of Schools, for the same period. The report of the Superintendent of Schools, for the year ending June 30, 1900, is a most interesting and valuable one, and it is the duty of the Board of Education to give it the most careful consideration. The report of the Superintendent of Schools, for the year ending June 30, 1900, is a most interesting and valuable one, and it is the duty of the Board of Education to give it the most careful consideration.

There is no doubt that the report of the Superintendent of Schools, for the year ending June 30, 1900, is a most interesting and valuable one, and it is the duty of the Board of Education to give it the most careful consideration. The report of the Superintendent of Schools, for the year ending June 30, 1900, is a most interesting and valuable one, and it is the duty of the Board of Education to give it the most careful consideration.

Instructions to the Board of Education, for the year ending June 30, 1900, are as follows: The Board of Education, for the year ending June 30, 1900, is to give the most careful consideration to the report of the Superintendent of Schools, for the same period. The report of the Superintendent of Schools, for the year ending June 30, 1900, is a most interesting and valuable one, and it is the duty of the Board of Education to give it the most careful consideration.

court unless the petition and the rulings of the court thereon are made to appear either by a bill of exceptions, stenographic report or a statement of fact, as provided by the Municipal Court Act. Gerdowsky v. Zawlewicz, 180 Ill. App. 481.

As the questions sought to be presented for our consideration on this writ of error were not preserved in such manner that they can be reviewed by this court, the judgment of the Municipal Court is affirmed.

AFFIRMED.

cannot unless the position was the subject of the court's decision  
are made to appear either of a will or otherwise, respectively  
report of a statement of fact, as required by the judicial body.  
Not. Carroll v. Carroll, 100 Ill. App. 2d.

In the event the court is so treated for  
our consideration on this side of the court were not received  
in such manner that they can be treated as this court, and  
Judgment of the Superior Court is affirmed.

Reversed.

156 - 21548

H. LASKEY,  
Defendant in Error.

vs.

SAMUEL MENDELSON and BENJAMIN  
MENDELSON, doing business as  
MENDELSON BROS.,  
Plaintiffs in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 494

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This case was here once before, when the judgment of the trial court was reversed for error in refusing to admit certain evidence proffered by defendant. Laskey v. Mendelson, et al. 191 Ill. App. 597. A retrial has been had, in which the error for which this court reversed the former judgment was not repeated and plaintiff succeeded on a trial before the court without a jury in recovering a judgment for \$147.44, and defendant again brings the record before us for review.

The controversy in this case is whether the "feed", the subject matter of this suit, was sold to defendants or to the North Western Paper Stock Co. The latter company went into bankruptcy but failed to schedule plaintiff as a creditor. This is only a circumstance to be considered in connection with all the other evidence, and although not conclusive is significant. Especially is this so when it is taken into account that defendants owned all but one share of the stock of the North Western Paper Stock Co.

An examination of all the evidence leads us to the conclusion that the trial judge might well find that plaintiff had maintained his claim by a preponderance of proof which in





his judgment was credible and worthy of belief. The fact that the defendants and the corporation were engaged in the same line of business and that the wagons owned by defendants were lettered with the name of the company and that a fire occurred which destroyed the property and books of the company, are embarrassing conditions which in no way were created by or are chargeable to plaintiff. The attempt of defendants to bar a recovery by plaintiff for the reason that while the account in suit was unpaid other bills were rendered by plaintiff to and paid by defendants, is entirely unwarranted, in view of the fact that there was no dispute that the account in suit had not been paid. Whether plaintiff by accident or design failed to render the account in suit before or at the time of rendering the other accounts which were paid, would not bar plaintiff from recovering, so long as the account remained unpaid. We think plaintiff's refusal, upon request, to file his claim against the estate of the bankrupt company is consistent with his attitude then and now, that defendants and not the company were his debtor.

There is no reversible error in this record and the judgment of the Municipal Court is affirmed.

AFFIRMED.



THE CLINTON COMPANY,  
a corporation,  
Defendant in Error,  
vs.  
OTTO C. STILES,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 505

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

On a trial before court and jury there was a judgment upon the verdict for \$550 and defendant brings the record to this court and asks a reversal.

At the close of the plaintiff's case defendant moved for an instructed verdict in his favor, which the court denied. Defendant failing to put in any evidence to support his defense, the cause went to the jury upon plaintiff's proofs and the instructions of the court.

*X 6*  
*well*  
~~The controlling facts in this case are that~~  
*and defendant*  
~~One Gustave R. Knospe, the stepfather of defendant's wife,~~  
~~was doing business under the name of Northern Investment~~  
~~Company and defendant was associated with Knospe in the~~  
~~concern. Knospe made a contract with plaintiff in the name~~  
~~of the investment Company for certain printing matter design-~~  
~~ated as "Bank of Prosperity Certificates." The whole or-~~  
~~der was for 4,250,000 of such certificates, 1,250,000 of~~  
~~which were delivered to and paid for by Knospe. After this~~  
~~defendant bought from Knospe the assets and business of the~~  
~~Northern Investment Company, and assumed its liabilities and~~  
~~continued to transact business in its name, in the same manner~~  
~~as Knospe had heretofore done. Among other liabili-~~  
~~ties assumed by defendant as a part of the consideration for~~  
~~the investment Company business, which he bought from Knospe,~~  
*lands*  
*original of the consideration*  
*just*  
*as Knospe*



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was plaintiff's claim in this action, although defendant contends <sup>that was</sup> ~~to the contrary~~. The ~~3,000,000~~ certificates were delivered to defendant at his place of business, but he <sup>refused</sup> ~~refused to receive them~~. ~~We think the following letter, written by defendant to plaintiff, is significant as supporting plaintiff's contention that defendant assumed the liability and agreed to accept the certificates and pay for them. This is the letter:~~

"The sample of the Bank of Prosperity bills that you sent to me are not quite up to standard, either in regard to quality or color of the sample on which you contracted to furnish me. I hereby notify you that I shall refuse to accept same and look to you to reimburse me on my losses I may sustain by being delayed on the advertising matter.

NORTHERN INVESTMENT CO.,  
Per O. G. Stiles, Mgr." \*

It will be seen from this letter that not only does defendant admit his assumption of the contract, but threatens to hold plaintiff in damages for its breach.

Defendant invokes the Statute of Frauds on the theory that his promise, if made, was a promise to pay the debt of another and not being in writing is void. We do not think the Statute of Frauds at all applicable to the conditions found present in this record. It is the law that where one enters into a contract for the benefit of a third party, such third party may maintain an action for its breach, as such a contract is not within the Statute of Frauds. Such a promise is in the nature of an original undertaking and is not required to be in writing. Brown v. Strait, 19 Ill. 88; McCasland v. Doorley, 47 Ill. App. 513; Wilson v. Bevans, 58 Ill. 232. As said in Commercial etc. Bank v. Kirkwood, 172 Ill. 563, "It is not necessary that the consideration should move from the third person if he elects to affirm the promise made in his behalf, and he does affirm it by bringing suit



upon it."

Defendant contends that plaintiff, by its amended claim, did not state a cause of action. If this contention is tenable, defendant waived it by pleading and proceeding to trial upon the merits. Bradley v. Federal Life Ins. Co., 178 Ill. App. 524.

✓ In defendant's affidavit of defense he did not claim that the circulars were not satisfactory or that they were not in accord with the contract. Such defenses, therefore, could not be availed of upon the trial. Defendant is limited to the defenses made by his pleading. Radison v. Fortune Bros. Brg. Co., 163 Ill. App. 276.

As defendant interposed no evidence to offset the case made by plaintiff's proofs, and such proofs establishing plaintiff's claim, the court was at liberty to direct a verdict in favor of plaintiff for the amount of its claim. In such condition of the record we are not concerned with the instructions which the court gave to the jury. If there are errors in the instructions, and we think there are, they will not operate to justify a reversal. Davidson v. Zorger, 181 Ill. App. 113; Taylor v. McCumber, 105 *ibid.* 87.

The merits of the case are with the plaintiff and as there are no errors in the record calling for a reversal, the judgment of the Municipal Court is affirmed.

AFFIRMED.





In the matter of the Estate of  
FRANCIS A. BARNES, Deceased,  
On Appeal of VILENA H. BARNES,  
Admx.,

Appellant.

vs.

PEOPLE OF STATE OF ILLINOIS,  
for use of GEORGE HAYLE, et al.,  
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

197 I.A. 511

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

The opinion (together with the Statement of Facts attached thereto) heretofore filed by us in the above entitled cause, affirming the judgment of the Circuit court, reads as follows:

A

"STATEMENT OF THE CASE. This is an appeal from an order of the Circuit court of Cook county directing the administratrix Vilena H. Barnes, hereinafter referred to as the appellant, to distribute cash remaining in her hands amounting to \$1,848.87 among the creditors of said estate, in proportion to the amount of their claims, in due course of administration.

*pleased that* Francis A. Barnes and Samuel R. Parish were co-partners doing business under the firm name of Barnes & Parish, for some thirty (30) years, as real estate brokers; that Samuel M. Parish died in December, 1904, and Francis A. Barnes as surviving partner succeeded to the business, possessed himself of the assets and the good will thereof, the business thereafter was conducted under the name of F. A. Barnes & Company; *being*

*later* that in the summer of 1906, Francis A. Barnes was taken sick and died early in November, 1906, which was within eleven months after the death of his former partner, Samuel R. Parish. Appellant, his widow, was appointed administratrix of her deceased husband's estate;

that Percy C. Barnes, a son of F. A. Barnes and the appellant, continued in the business after the death of Samuel A. Parish. It is maintained by the appellant that he became a partner in the business. Appellant evidently proceeded upon that theory, because she claimed to have paid ~~him~~ \$350 for his share of the business, including the good will, which she claimed her son had succeeded to as surviving partner upon the death of Francis A. Barnes.

*white* ~~being~~ the latter part of November, 1906, the appellant, in consideration of \$1,550, sold to G. H. Schneider & Company the real estate business of F. A. Barnes & Co., including the good will. In reporting said sale to the

Percy C. and his

It further appears from the evidence that later





Probate court, the appellant accounted only for the sum of \$165.55, which represented the inventoried value of the fixtures and furniture belonging to said real estate business; leaving unaccounted for the sum of \$1,383.45. At this time the said estate of Francis A. Barnes was insolvent to an amount upwards of \$10,000.

"Thereafter in the Probate court of Cook county the appellant was ruled to show cause why she should not account for the said \$1,383.45. Appellant's reply was to the effect that the said sum of \$1,383.45 represented the amount paid by G.H. Schneider & Co. for the good will of the business of F. A. Barnes & Company; that the said good will sold to G. H. Schneider & Company was her own personal property by purchase from Percy C. Barnes, and had never been vested in the estate.

"The Probate court on hearing allowed appellant credit for the \$350 paid to Percy C. Barnes, which expenditure was approved as a purchase of an outstanding claim in the interest of said estate, and as an expense of administration; and ordered the appellant to account to the estate of said Francis A. Barnes for the balance, viz., \$1,033.45. Appellant refused, and failed to account for the aforesaid \$1,033.45 and therefore the Probate court stated an account for her, showing a credit to the estate of the said \$1,033.45, from which credit and accounting appellant took an appeal to the Circuit court of Cook county, where, upon a hearing, the order complained of in this appeal was entered. *B*

"MR. JUSTICE FARM delivered the opinion of the court.

"Appellant, on the trial of the case in the Circuit court, to sustain her contention that Percy C. Barnes was a partner, offered the deposition of the said Percy C. Barnes; objection was made, however, and the objection sustained.

"Appellant also offered the testimony of herself as administratrix, in defense of her report; and in support of her acts as administratrix, to which objection was made and the objection sustained.

"Another issue raised was the question whether or not the good will was an asset of the partnership or the individual property of Percy C. Barnes which he acquired upon the death of his father, as surviving partner. In our view of the case, however, it is not necessary for us to pass upon any of these contentions.

"The account stated by the Probate court credited the estate with \$1,383.45 cash received for the sale of the real estate business of F. A. Barnes & Company. It also debited the estate with the \$350 paid Percy C. Barnes. This latter item represented the amount paid by appellant to her son for what she claimed was his share in the business of F. A. Barnes & Company, which included the good will. This appears in her account as administratrix, and must be considered by this court as a payment by the appellant as administratrix of the estate of F. A. Barnes, deceased. That the appellant herself so treated it is evident from the fact that on her appeal from the Probate court to the Circuit court, when ruled to file a bill of particulars, appellant limited the appeal to

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9. ninth is the fact that the  
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1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.



the item of \$1,033.45, which is the difference between the amount she received for the sale of the business of F. A. Barnes & Company and the \$350 paid Percy C. Barnes. Appellant acquiesced in and accepted this charge of \$350 against the estate.

"In view of the fact that appellant used the funds of the estate in this transaction, the benefit thereof must necessarily inure to the estate which she represented. We cannot, therefore, concur in appellant's contention that the good will of this business, purchased as she claimed, from her son, became appellant's separate property; on the contrary, it vested in the estate of Francis A. Barnes, and the proceeds realized from the sale thereof should be accounted for as directed by the order of the Circuit court.

"Finding no reversible error, the judgment of the Circuit court will be affirmed."

After the same was filed a rehearing was granted.

In their petition for rehearing, counsel contend that there was nothing in the record to justify the court in holding that the \$350 paid by appellant to her son Percy Barnes, for his interest in the business of F. A. Barnes & Company, was paid out of funds belonging to the estate of Francis A. Barnes, deceased, because said account stated was not the account stated by appellant of her own volition but was stated for her by the Probate court upon her failure to account for the moneys realized from the sale of the good will of the business of F. A. Barnes & Company.

We have carefully considered this point, and adhere to the conclusion previously arrived at, viz., that the appellant, in her appeal to the Circuit court, by reason of her failure to except to the allowance of the \$350, must be considered to have acquiesced in the action of the Probate court. The trial in the Circuit court was de novo, but appellant was there required in her bill of particulars to state the items in the account stated by the Probate court to





which she objected. She merely complained, in her bill of particulars, of the item of \$1,033.45, which is the amount she received for the good will of the business, less \$350 allowed her by the Probate court.

As shown in her bill of particulars, appellant was willing to accept the act of the Probate court in crediting her with \$350; but now, when such acceptance is used against her, she stands ready to assail the action of the Probate court in making such allowance. This point should have been raised in the bill of particulars. If appellant did not like the act of the Probate judge in crediting it in that way, she should have, in her bill of particulars, stated what was a true account, and questioned the act of the Probate judge in the matter of the credit for \$350.

In that state of the record, appellant is precluded from denying that she purchased the interest of Percy Barnes in the business of F. A. Barnes & Company, including the good will, for the benefit of the estate of Francis A. Barnes, deceased.

Necessarily, this entire contention of the appellant rests upon her claim that Percy Barnes was a partner in the firm of F. A. Barnes & Company at the time of the death of Francis A. Barnes, because of which the good will of the firm passed to him as the surviving partner, upon the death of the said Francis A. Barnes. Unless the said Percy Barnes was a partner, all of the assets of the said firm of F. A. Barnes & Company, including

[illegible]

Formula 1. Natural, domestic.  
including the food will, for the benefit of the owner or  
other person in the household or in the vicinity of the house.  
cluded from the scope of the invention and the subject of the  
In that sense, the invention is not.

[illegible]

the good will, and all moneys realized from the sale of said assets, were subject to the rights of the creditors of the estate.

In support of her claim that Percy Barnes was a partner in the said firm, appellant offered the deposition of Percy Barnes, to the admission of which objection was made and sustained; also the evidence of one Walter A. Salmon, a former employe of F. A. Barnes & Company.

While we have serious doubt as to the admissibility of the said deposition, we have carefully examined it in its entirety. After giving said deposition all its probative value, and after carefully considering all the other evidence in the case, we are satisfied that this evidence does not show, or even tend to show that the said Percy Barnes had at any time prior to the death of Francis A. Barnes become a member of the said firm of F. A. Barnes & Company.

On the contrary, as we read the record in this case, we are of the opinion that the claim of partnership was but a subterfuge put forth by appellant to serve as the basis of her claim; for in no other way could she have endeavored to secure at the expense of the creditors of her deceased husband's estate, - which was greatly insolvent - the sum of money for which she sold the assets of the estate.

In this view of the case, it is needless to say that we find no error in the action of the Circuit court in directing appellant to account for the sum of \$1,033.45, and its judgment will therefore be affirmed.

of new energy, now coming in the form of the

It appears to me that the only way to  
prevent the kind of thing which has happened  
in the case of the "L. A. Times" is to  
have a law which would make it a crime  
to publish a statement which is known to  
be false and which is intended to cause  
damage to the reputation of another person.

On the morning of the 10th, the ship was at anchor in the harbor of San Francisco. The ship was at anchor in the harbor of San Francisco. The ship was at anchor in the harbor of San Francisco.



AUGUSTA VOELKNER,

Plaintiff in Error.

vs.

LOUIS A. OTT, MABEL  
C. OTT, HENRY SHRIK  
and LUCY SHRIK,

Defendants in Error.

ERROR TO

MUNICIPAL COURT,

OF CHICAGO.

197 I.A. 520

STATEMENT OF THE CASE.- Plaintiff in error (plaintiff below) brought suit against defendants in error (defendants below) on an interest coupon for \$90 due January 18, 1914. On a hearing before the court without a jury, suit was dismissed and judgment entered against the plaintiff, to reverse which plaintiff has sued out this writ of error.

The record in this case is made up of statements by counsel, and the testimony of several witnesses on behalf of the defendants. The undisputed facts are as follows:

\* On July 18, 1911, defendants Shriks ~~were the owners of~~ certain realty, upon which a loan in the sum of \$3,000 was negotiated ~~for them~~ by John P. Foerster & Company, mortgage bankers. To ~~evidence this loan~~, defendants Shriks executed <sup>a</sup> their principal promissory note in the sum of \$3,000, due <sup>in</sup> five years ~~from date~~, with interest <sup>semi-annually</sup> at the rate of six per cent. per annum, payable ~~semi-annually~~; <sup>and</sup> which ~~said interest was~~ evidenced by ten interest notes or coupons, numbered from one to ten inclusive. All of said notes were made payable to and indorsed by the makers (Shriks) and provided that unless otherwise specified in writing by the ~~lawful~~ holder thereof, they



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should be payable at the office of John P. Foerster & Company, Chicago.

On May 16, 1912, defendants Shriks sold <sup>the</sup> ~~said~~ real estate to defendants Otts, subject to the ~~aforsaid~~ incumbrance of \$3,000.

The evidence further shows that during December, 1913, defendants Otts received notice from John P. Foerster & Company that interest coupon #5 for \$90 would be due January 18, 1914; that on January 6, 1914 one ~~Louis~~ Thies, a brother-in-law of defendant Louis Ott, ~~went to the office of John P. Foerster & Company with the notice as to this interest coupon, and paid the cashier \$90 to take up the interest coupon mentioned in said notice; that the cashier stated that the note had not yet been received, but he gave him a receipt in the following form:~~

*John P. Foerster & Company*

"No. 468. Chicago, Jan. 6, 1914.  
Received of Louis A. Ott, \$90.00 in payment of his interest coupon due January 18, 1914, same to be cancelled and mailed as soon as received by us.

John P. Foerster & Co.,  
By U. M. Foerster;"

that on January 9, 1912 - ~~three days after the payment of this \$90 - said~~ John P. Foerster & Company were forced into involuntary bankruptcy and the ~~said John P. Foerster & Company had not before, nor have they since then paid the said \$90 to plaintiff;~~ <sup>and Ott</sup> that the interest coupon, at the time payment was made by defendants Otts to ~~John P. Foerster & Company, and up to the beginning of this suit, was in possession of the plaintiff.~~ <sup>and since then</sup>

The evidence further shows that prior to this payment of \$90 to John P. Foerster & Company in payment of interest coupon #5, four other interest coupons had matured

should be signed at the Office of John F. Kennedy

January, 1961.

10

On May 11, 1961, the following letter was sent to

John F. Kennedy, President of the United States:

Dear Mr. President:

The following letter was sent to John F. Kennedy

on May 11, 1961, the following letter was sent to

John F. Kennedy, President of the United States:

Dear Mr. President:

The following letter was sent to John F. Kennedy

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and were paid *to John P. Foerster & Company in*  
*a similar manner.*

Interest coupon #1 was due January 18, 1912. The evidence shows that this coupon was paid to John P. Foerster & Company on January 2, 1912. Coupon #2 which was due July 18, 1912, was paid in the same manner on July 1, 1912. Both these payments were made by defendants Shriks, prior to the sale of the property by them to defendants Otts.

Interest coupon #3, due January 18, 1913, was paid on January 2, 1913, to John P. Foerster & Company. Interest coupon #4, due July 18, 1913, was paid July 10, 1913, also ~~to John P. Foerster & Company.~~ All of said interest coupons were stamped across the face with the words, "Paid, John P. Foerster & Company," and the respective dates upon which payments were made.

~~Leroy Thies, who paid interest coupon #5, further testified that he also paid coupons #3 and #4 for defendant Ott;~~ that both these payments were made at the same place, viz., at the office of John P. Foerster & Company, and in the same manner in which payment was made on interest coupon #5.

It also appeared ~~in the evidence,~~ that counsel ~~in the case~~ for the plaintiff were also counsel for John P. Foerster & Company in the bankruptcy proceedings, and that ~~in said proceeding,~~ the claim of plaintiff's based upon this same interest coupon, was filed. *Filed in bankruptcy. \**

Upon this state of the record the judgment complained of was entered.







MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

Plaintiff's position is that "she is the bona fide holder of the note, which was introduced in evidence uncanceled and unpaid; that the note was never in the possession of Foerster & Company and defendants had no notice of that fact when they sent to pay it; that it was paid before maturity at the risk of defendants."

Defendants contend that the payment of \$90 to John P. Foerster & Company, under the circumstances set forth in the evidence, was a payment made to the duly authorized agent of the holder of said note, even though the payment was made before maturity and without securing possession of the note at the time of the payment; and in support of said contention they rely upon the principle set forth in *Thorn-ton v. Lawther*, 169 Ill. 228, wherein the court said (p.231)

"It is well settled that authority to an agent to receive payment of a debt is not, of itself, authority to do so before it falls due. (Mechan on Agency, sec. 380, and cases in note 1; *Thompson v. Elliott*, 73 Ill. 221.) But if there be a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, extending the ordinary reach of authority, that may well be held to give full validity to the act." (citing Story on Agency - cited and approved in *Thompson v. Elliott*, supra.)

The primary question, under these two contentions, is whether or not John P. Foerster & Company were the duly authorized agents of plaintiff on January 6, 1914, when defendants Otts paid the \$90 to them in payment of the interest coupon in question.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CILA) in the United States. The Commission is therefore unable to determine whether the CILA is a legitimate organization or a subversive one.

ten v. Newberry, 115 Ill. 285, reversed the lower court's (1894) decision that Newberry was not a partner in the firm. The court held that the partnership was not a partnership at law, but a partnership in equity, and that Newberry was a partner in equity.

[illegible]

the primary question, under which two considerations, it is evident in the first place, that the primary question is not the same as the secondary question, and that the primary question is not the same as the secondary question.

The evidence shows that this coupon, like all the others, was made payable at the office of John P. Foerster & Company. It was expressly provided therein and in the other interest coupons as well, that unless otherwise notified in writing, all payments should be made at the office of the said John P. Foerster & Company.

There is no evidence in the record that any of the defendants ever knew that plaintiff was the holder of this or any other notes. The loan was originally made by John P. Foerster & Company. No notice had ever been served upon any of the defendants to pay anyone save John P. Foerster & Company.

The four previous interest coupons had been paid to John P. Foerster & Company. In every instance letters had been sent by John P. Foerster & Company notifying <sup>defendants as to when</sup> ~~that~~ payments were due. In every instance these notes were paid before maturity, and in the two instances prior to the last, they were paid under the same circumstances, viz., the notes were not in possession of John P. Foerster & Company, but were to be delivered thereafter, and they were actually delivered and marked paid.

No objection had ever been made because of payments to said John P. Foerster & Company, and only after the said John P. Foerster & Company were forced into bankruptcy, and after plaintiff had filed her claim on the interest coupon in question, in the bankruptcy proceedings, did she assert that the said John P. Foerster & Company were not authorized to receive payment for this and the other interest coupons.

Clearly, under this state of facts, the court properly found that the payment before maturity to John P. Foerster





& Company was a payment of this interest coupon to the duly authorized representative of the plaintiff. The fact that said note was not in their possession at the time is not controlling. As was well said in Noble v. Nugent, et al., 89 Ill. 522 (p.526:)

"The circumstances that the notes were not surrendered, as against clear proof that they were paid to a person having authority to receive payments, amounts to nothing. Their possession is simply presumptive evidence of nonpayment, which may always be overcome by proof that they were in fact paid."

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.



...we were well into the night ...  
and was not in their presence at the time it was  
submitted representative of the situation. The fact that

(1952, 1953, 1954) 224, 143, 95.

THE following is a list of the names of the persons who have been identified as having been in contact with the subject of this report, and who have been identified as having been in contact with the subject of this report, and who have been identified as having been in contact with the subject of this report.

to the amount of the debt, and the amount of the debt is the amount of the debt.

0002-1231

338

20-83  
20-83

JENNIE MARGENT,

Defendant in error,

vs.

McKENNETH & CO.,  
a Corporation,

Plaintiff in error.

MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 523

1. EXCELSIOR BOTTLE CO. delivered the goods  
of the court:

This is an action brought in the Municipal Court of  
Chicago by Jennie Margent, defendant in error and hereinafter  
referred to as the plaintiff, against McKenneth &  
Company, plaintiff in error and hereinafter referred to  
as the defendant, to recover the sum of \$200 for money  
loaned by plaintiff to said defendant.

On the trial before the court without a jury, the  
court found the issues for plaintiff and awarded her  
damages in the sum of \$200, upon which finding the judg-  
ment was entered to reverse which defendant has taken out  
this writ of error.

*An Illinois*  
\* Defendant is a corporation, ~~organized under the laws~~  
*as a* ~~of Illinois.~~ *the* capital stock ~~is divided into shares,~~  
80 of which were in the name of and owned by C. C. Young,  
one in the name of Elizabeth Young, and one in the name  
of one Young.

*for*  
~~On November, 1911, said C. C. Young left Chicago~~  
~~and went to Portland, Oregon.~~

The defendant ~~corporation~~ was engaged in the publica-  
tion of *Reflex* ~~directories, in various editions, and at one~~  
~~time it was published in~~ *in November 1916*  
~~and in publishing an architect's directory. It appears~~

1855 A. 1501

the

2

"I want to know what you are doing. If nothing  
you better use the money there and send out ad-  
vertisers for advertising don't pay over \$100 and be care-  
ful of bad orders - ~~and if you can't find any more~~  
~~order them up~~. You must have some business.

The first of these is the fact that the *Communist*  
 Party of the United States of America is a  
 revolutionary party, and as such it is  
 opposed to the existing social order, and  
 to the existing government, and to the  
 existing economic system, and to the  
 existing political system, and to the  
 existing cultural system, and to the  
 existing religious system, and to the  
 existing moral system, and to the  
 existing legal system, and to the  
 existing educational system, and to the  
 existing scientific system, and to the  
 existing artistic system, and to the  
 existing literary system, and to the  
 existing musical system, and to the  
 existing dramatic system, and to the  
 existing theatrical system, and to the  
 existing cinematic system, and to the  
 existing television system, and to the  
 existing radio system, and to the  
 existing newspaper system, and to the  
 existing magazine system, and to the  
 existing book system, and to the  
 existing record system, and to the  
 existing tape system, and to the  
 existing film system, and to the  
 existing video system, and to the  
 existing computer system, and to the  
 existing internet system, and to the  
 existing mobile system, and to the  
 existing wireless system, and to the  
 existing satellite system, and to the  
 existing space system, and to the  
 existing ocean system, and to the  
 existing land system, and to the  
 existing air system, and to the  
 existing water system, and to the  
 existing fire system, and to the  
 existing earth system, and to the  
 existing sky system, and to the  
 existing sun system, and to the  
 existing moon system, and to the  
 existing stars system, and to the  
 existing planets system, and to the  
 existing galaxies system, and to the  
 existing universe system, and to the  
 existing everything system, and to the  
 existing nothing system, and to the  
 existing everything and nothing system,







~~owned all the stock of~~ <sup>company</sup> ~~defendant~~ <sup>and had absolute control</sup> until he left for Portland, when he turned over the active management to Young, who took charge under an agreement to purchase; and that in the spring of 1913 Young was not running things to suit him, so he arranged with Mrs. Garmire to look after things and look after finances. He also testified that in March, 1913 he sold his interest in ~~and severed his connections with defendant company.~~

Garmire further testified that in ~~September, 1913~~ Young wrote him he could not complete the agreement to purchase ~~the company~~, and that he then agreed with Young to resume control and management ~~of it~~, and also testified ~~that~~, that he wrote Mrs. Garmire to look after the business and "get some solicitors and put them out on the Architects, one of the books published by this company."

~~Defendant also introduced the testimony of J. J. Brennan~~ <sup>for defendant</sup> ~~who~~ testified that he was secretary and treasurer of defendant, and ~~that he~~ owned 25 shares of stock; that in May, 1913, Mrs. Garmire ~~wrote to him and stated~~ <sup>to him</sup> that she had a claim for \$200 against Garmire personally but not a claim against the company, and inquired whether all moneys had been paid to Garmire, ~~and stated~~ <sup>she says</sup> that she was in hopes that all moneys had not been paid to Garmire, so she could attach ~~them~~.

~~There was also testimony offered by defendant that~~ Mrs. Garmire had previously commenced suit for herself ~~to recover this sum of \$200. Mrs. Garmire,~~ testified ~~as to the conversation with Brennan,~~ that she told ~~him~~ <sup>Bellevue</sup> the claim was against the defendant



~~company, and asked payment of \$100.00; and that~~  
~~the plaintiff is bringing suit on the money; the plaintiff fol-~~  
~~lowed the advice of counsel.~~

At the conclusion of the evidence, the court found the issues for the plaintiff and assessed plaintiff's damages in the sum of \$200. A motion for a new trial was made by defendant and overruled; then followed a motion in arrest of judgment, which likewise was overruled; to all of which rulings defendant excepted. then entered judgment and The court fixed the stay bond in the sum of \$300.

Defendant then presented to the court two propositions of law, which were as follows:

1. "The court holds as a matter of law that Elizabeth Carmine had no authority to borrow money for the use of defendant.
2. "The court holds as a matter of law that the plaintiff under the evidence in this case is not entitled to recover against the defendant."

Both of these the court refused.

The record shows that those propositions of law were submitted after the findings of the court and judgment had been entered. Counsel cannot, therefore, avail themselves of the assignment of error that the court erred in refusing these propositions of law.

Defendant also assigned as error that the court <sup>and</sup> erred in finding for the plaintiff/in entering judgment. This assignment, however, goes only to the question whether, under the evidence, the court was warranted in finding the issues for the plaintiff and in entering judgment thereon.

There is no question, from the evidence, that plaintiff did advance certain moneys to Mrs. Carmine. There is a conflict in the evidence as to whether





this money was loaned to Mrs. Garnire for the use of C. O. Garnire personally, or for the use of the defendant corporation. The court was evidently of the opinion that the money was loaned for the use of and was in fact used for the benefit of the defendant.

As we read the record, the court might have come to that conclusion, not only from the testimony of the plaintiff and Mrs. Garnire, but also from the testimony of C. O. Garnire, offered on behalf of the defendant. In his testimony, Garnire stated that he advised his wife to send out solicitors for the architects' publication, confirming thereby, the statement in his letter of April 20, wherein he suggested to her that she borrow money to send out solicitors.

While it is true, that after Mrs. Garnire took company, charge of the defendant/ as directed by her husband, all moneys were deposited in the name of C. O. Garnire, this was merely following Garnire's instructions so that Young would have no control over the money. Such action affected only the internal management of the defendant company, and could not affect the rights of creditors. The mere fact that Mrs. Garnire did not enter upon defendant's books any record of the transaction with plaintiff is only a circumstance which the court had the right to take into consideration in determining the issues in controversy.

As we read the record in this case, we are satisfied that the money obtained from the plaintiff was used for the purpose of paying expenses of the defendant; that defendant had the use of this money, and that in law it is charged with the repayment of it, even though Mrs.

The first thing I noticed when I stepped out  
 of the car was the smell of the sea. It was  
 a salty, bracing scent that I had never  
 experienced before. The air was cool and  
 refreshing, a stark contrast to the hot  
 sun that beat down on the car. I took a  
 deep breath, savoring the moment. The  
 sound of the waves crashing against the  
 shore was a constant, soothing rhythm.  
 I walked along the beach, my feet sinking  
 into the soft, golden sand. The sun was  
 low in the sky, casting a warm, golden  
 glow over everything. The water was a  
 beautiful shade of blue, with white foam  
 from the waves. I felt a sense of peace  
 and tranquility that I had never felt  
 before. The world seemed to be at  
 standstill. I was alone, yet I felt  
 connected to something greater. The  
 ocean was calling to me, and I knew  
 that I had found what I was looking  
 for. I was home.

Samuels had no authority to borrow it. Allen vs. Pa. v. Biblical Inst., 143 Ill. 2d.

Mr. Brennan, who is not chief stockholder of the defendant, at the time he bought the stock, took an affidavit from Samuels as to any outstanding indebtedness of the corporation. Such affidavit, however, can not be used as against creditors, unless creditors had knowledge of such fact, and then such knowledge could be considered only as a circumstance affecting the issue in question. There is, however, no evidence at all that plaintiff knew of the existence of such affidavit or that <sup>she knew</sup> defendant's books did not show the indebtedness of the company due to her.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.





522 - 20682.

ELIZABETH GARRIRE,  
Defendant in error,  
vs.  
McDONOUGH & COMPANY, a corporation,  
Plaintiff in error.

ERROR TO

REVERSAL COURT

IN REVERSAL.

197 I.A. 527

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error was sued out to review a judgment obtained by Elizabeth Garrire, defendant in error. hereinafter referred to as plaintiff, against McDonough & Company, a corporation, hereinafter referred to as defendant, for services alleged to have been performed by the plaintiff in its behalf. ~~The~~ <sup>plaintiff</sup> was the wife of C. G. Garrire, <sup>formerly</sup> secretary and treasurer of the defendant company, and owner of twenty-four of the twenty-five shares of its stock. One share seems to have been in the name of the plaintiff, but ~~from her testimony~~ <sup>it appears</sup> to have been the property of her husband. Garrire had undertaken to publish an architects' directory, and up to the time when plaintiff's services are alleged to have begun, the work was being carried on by or through the defendant. The president of the company, Mr. Young, was at that time in charge of the work in connection with the proposed directory, and all moneys collected were deposited to the credit of the defendant. Garrire, who ~~seems~~ <sup>was</sup> at that time ~~to have been engaged in the practice of law in Portland, Oregon,~~ wrote ~~his wife~~ <sup>the plaintiff</sup> in March, 1912, directing her in regard to the settlement of certain claims here in Chicago, apparently in connection with her former law business, and also instructing her to take charge of the directory, receive all mail, attend to all correspondence, receive all money and pay it out, and to discharge Young, the president of the company, if he objected. Garrire

10711.282

assured plaintiff that she could do this by calling a meeting of the company and voting his twenty-four shares of stock. Upon the receipt of this letter <sup>thereupon</sup> plaintiff took charge of the directory, closed out the defendant's ~~company's~~ bank account, deposited all money received to the credit of the private account of Carmire, and continued at the work, ~~she~~ <sup>ish</sup> from March 4, 1912, to December 24, 1912. She also testified that all moneys received were used either by her husband or herself, and that while she had charge of whatever books there were, she never ~~made any statement upon these books~~ <sup>made entries</sup> indicating that she was employed by the company. The plaintiff acted under the authority of Carmire alone. The evidence ~~will not~~ <sup>did not</sup> disclose any authority in him to employ any one on behalf of the company. ~~Careful examination of~~ The record further disclosed <sup>at all times</sup> that ~~during all~~ the time of her employment, the plaintiff acted as agent for Carmire in his personal interest, and ~~for him~~ <sup>by</sup> alone. \* Every dollar she received she turned over to him or used herself. From the time she took possession, she conducted the business as the private concern of her husband, disregarded the corporate entity entirely, and treated all the proceeds of the business as his private, individual property. She very probably made use of the name of the defendant, but only as an asset to promote what she was carrying on as her husband's business.

+ In March, 1913, the stock of the defendant owned by plaintiff's husband was purchased by a third party, who did not know and could not have known that plaintiff had any claims against defendant. + From this state of the record it is clear that the plaintiff was not hired by any one having legal authority to represent the defendant, and that her only ground for recovery would be upon an implied promise on account of the work done for the defendant at its request.





580

20917.

ROSE MARTIN PRATT,  
Appellee,

vs.

JOHN PRATT, JR.,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

197 I.A. 530

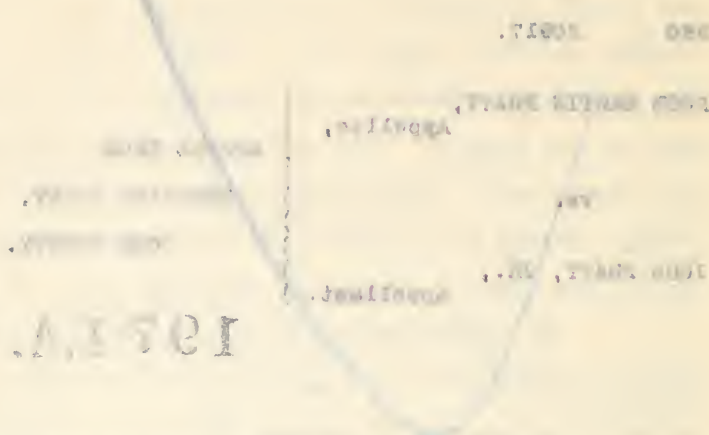
STATEMENT OF THE CASE.- This is a bill for separate maintenance brought by Rose Martin Pratt, appellee, hereinafter referred to as the complainant, against John Pratt, Junior, appellant, defendant below.

\* The parties to this suit were married on the 26th day of October, 1912, in ~~Michigan City, Indiana~~, and lived together until the 23rd day of February, 1913.

The amended bill upon which the decree is based was filed ~~on~~ <sup>and</sup> October 2, 1913, ~~said bill~~ <sup>which</sup> alleged that complainant at all times, ~~during the time she lived with~~ <sup>while in</sup> her husband, faithfully discharged her duties as wife and treated defendant with kindness and consideration; that defendant at no time provided for complainant a proper home, but ~~during the first four weeks of their married life~~ <sup>from</sup> suggested that they live apart, and ~~thereafter provided for the complainant and defendant a room in the home of the defendant's parents; that while living there, defendant treated her with disrespect and without the consideration due a wife; that he~~ <sup>and</sup> at all times completely ignored her, refusing to speak to her, and treated her ~~at all times~~ <sup>and</sup> as though she were a stranger: that



1971. 330



STATEMENT OF THE CASE. - This is a bill for  
separate maintenance brought by Mrs. Mary Smith,  
appellee, against her husband, John Smith, appellant.  
The bill is filed in the County of ... State of ...  
and it is alleged that the said John Smith, appellant,  
has failed to provide for the support and maintenance  
of the said Mary Smith, appellee, and that she is  
therefore entitled to separate maintenance.

The married life of the parties has been a  
series of unhappiness and discord. The husband  
has been addicted to the use of intoxicating  
liquors and has neglected his family. He has  
been absent from home for long periods of time  
and has failed to provide for the support and  
maintenance of the wife and children. The wife  
has been forced to support the family on her  
own resources and has been subjected to great  
suffering and distress. She is now unable to  
support the family and is therefore entitled to  
separate maintenance.

*defendants*  
~~said acts on defendant's part made further living with~~  
him as his wife unendurable and a menace to her health,  
~~by reason of which she was compelled to leave defendant~~ *my her* *him*  
on the 23rd day of February, 1913; and that ~~she has since~~  
~~then, up to the filing of this bill, continued to live~~ *less*  
separate and apart from him; that when she informed de-  
fendant she ~~was compelled~~ *withheld* to leave him, he stated to her  
that he was satisfied she should go at once; that there-  
after she endeavored to work, but ~~found that~~ owing to the  
poor state of her health ~~she~~ could not continue; that she  
repeatedly went to the home of defendant and requested him  
to permit her to return and live with him and that ~~he~~ *to* provide  
her with a home; that ~~she also made this request over the~~  
~~telephone; that defendant, however, refused, to provide a~~ *fill*  
~~home and told her he would not take her back.~~ Then followed  
allegations that complainant was physically unable to con-  
tinue ~~her employment;~~ *work* that she was without funds, and that  
~~she had no future means of support.~~ *or* The bill ~~concluded~~  
~~with the usual prayer for a decree of separate maintenance.~~

*in his answer*  
The answer of the ~~defendant~~ *J* categorically denied  
all the charges ~~set forth in the bill of complaint.~~  
On final hearing, the court entered a decree finding that the  
complainant was entitled to the relief sought, and decreed  
her \$30 per month alimony, also \$50 solicitor's fees; to  
reverse which defendant has prosecuted this appeal.

MR. PRESIDING JUSTICE PAM delivered the opinion  
of the court:

To maintain her bill, it was necessary for com-  
plainant to show that she was living separate and apart  
from her husband, without fault on her part.

2000

from our response, without fail on our part.

Defendant contends that the evidence offered by complainant failed to show this. If it was necessary for the evidence of the complainant to show that defendant was guilty of acts which would entitle complainant to a divorce, then the position of the defendant would be tenable. But the provision for separate maintenance does not contemplate such a situation. While a wife is not permitted to leave the husband merely because of incompatibility or trivial difficulties, yet she is not compelled to live with a husband who is guilty of conduct which endangers her health and which makes her married life miserable and unendurable. *HTW 6/29*

In Johnson v. Johnson, 125 Ill. 510, our Supreme court has said on this point (p.515):

"No encouragement can be given to the living apart of husband and wife. The law and good of society alike forbid it. But a wife who is not herself in fault is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person or health, nor where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable."

In the same decision the court held that the "'fault' here meant and contemplated, is a voluntary consenting to the separation, or such failure of duty or misconduct on her part as 'materially contributes to a disruption of the marital relation.'"

The bill also alleges that after the complainant had left defendant and was living separate and apart from him she repeatedly requested him to take her back and provide her with a home, but that defendant refused to do so.



Defendant contends that the evidence of guilt is  
compellingly established by the facts. It is the duty of the  
jury to weigh the evidence and to determine whether the  
defendant is guilty of the crime charged. The evidence  
adduced by the State is sufficient to establish the  
defendant's guilt beyond a reasonable doubt. The jury  
is instructed to find the defendant guilty of the crime  
charged if they believe the evidence is sufficient to  
establish the defendant's guilt beyond a reasonable doubt.  
The jury is instructed to find the defendant guilty of the  
crime charged if they believe the evidence is sufficient to  
establish the defendant's guilt beyond a reasonable doubt.  
The jury is instructed to find the defendant guilty of the  
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establish the defendant's guilt beyond a reasonable doubt.

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crime charged if they believe the evidence is sufficient to  
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establish the defendant's guilt beyond a reasonable doubt.



If the evidence supports the allegations in that regard, then even though the original leaving may not have been warranted, the law would consider her living separate and apart without fault on her part, entitling complainant to the relief prayed for. Thomas v. Thomas, 44 Ill. App. 604; id. 152 Ill. 577. The law, as set forth in these decisions, has not been departed from.

The question, therefore, that presents itself to this court is whether the court below was warranted in finding in the decree that the complainant was living separate and apart from defendant without fault on her part. A determination of the issues here involved depends practically upon the testimony of two witnesses - the complainant and the defendant.

The evidence on the part of the complainant fairly tended to prove the allegations material to the issues. The evidence offered on behalf of the defendant, while contradictory of the testimony offered on behalf of the complainant, was not so direct, and rather evasive. The court evidently believed the testimony of the complainant and accordingly rendered a decree based upon the evidence of the complainant.

Certain language employed by the chancellor during the trial shows that he was impressed with the belief that the home originally provided by the defendant for the complainant was inadequate, and the environment disturbing and unpleasant. Moreover, that the conduct of the defendant was calculated to force the complainant therefrom, and we cannot say that it was not a fair inference



from the evidence, that such was the intent of the defendant.

It further appears from the record, that the chancellor was of the belief that the complainant desired to return to the home of the defendant and offered to do so repeatedly, and that defendant did not desire her to do so; and our own reading of the record confirms the belief of the chancellor.

While, as already stated, it was practically one witness against the other, save that defendant also had his mother testify in his behalf, yet the number of the witnesses is not alone determinative of the question as to where the preponderance of the evidence <sup>in</sup> the case lies. As was well said in Johnson v. Johnson, *supra* (p.514):

"In cases in chancery, when the evidence is conflicting, and the witnesses have been examined orally in court, it is said, in Coari v. Olsen, that there is the same necessity existing as when there has been a trial by jury, that the error in the finding of fact shall be clear and palpable to authorize a reversal. The rule announced is a just one, when the evidence to which credit is given is sufficient to sustain the decree, for the very manifest reason that the chancellor had the witnesses before him, with an opportunity of observing them while testifying, and was thus afforded facilities, frequently of the greatest importance, in determining the weight and credibility of their evidence, which we, from the very nature of the hearing, on appeal, can not have."

This same rule of law was announced by this branch of the Appellate court in Springer v. David Bradley Mfg. Co., 191 Ill. App. 45, wherein was cited the following language from Calvert v. Carpenter, 96 Ill. 63 (p.59):

from the evidence, that such was the nature of the  
testimony.

It further appears that the learned judge  
Chancellor was of the belief that the testimony was  
to return to the name of the witness in question, to be  
so repeatedly, and that the testimony was to be  
do so; and our reading of the record confirms our  
belief of the Chancellor.

While, as already stated, it was practically  
one witness against the other, and that testimony  
also had his mother testify to the belief, but the  
number of the witnesses is not alone the basis  
of the question as to what was the probability of the  
evidence in the case. As was said in Johnson v.  
Johnson, supra (1911):

"It would be dangerous, and not altogether  
in accordance with the evidence, to say that the  
evidence is in favor of the belief, in Johnson  
v. Johnson, that there is no such thing as a  
belief, as was said in Johnson v. Johnson,  
that the jury in the finding of fact should be  
clear and satisfied to believe a statement.  
The law is not a mere rule, and the  
evidence to which credit is given is not to be  
to sustain the decree, for the very reason that  
not only the Chancellor but the witnesses being  
him, with an acknowledgment of the fact that  
testimony, and the testimony is not to be  
frequency of the greatest importance, in order  
into the weight and credibility of their testimony,  
and we, from the very nature of the case, do  
appeal, and not have."

This case is cited in Johnson v. Johnson,  
page 101 of the Appellate report in Johnson v. Johnson,  
101 Ill. App. 2d, where it was said that the  
language from Johnson v. Johnson, 101 Ill. App. 2d, 101:



"It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing."

In the case at bar, we are not only of the opinion that the finding of the court is not clearly and manifestly against the weight of the evidence, but that the court was fully warranted in finding that the complainant was justified in living separate and apart from defendant, and that in so doing it was without fault of her own.

Defendant complains of certain rulings of the court with reference to the admission and refusal of evidence. We have carefully examined the record with reference to the errors complained of, and are of the opinion that the defendant's contentions in regard thereto are without merit.

Finding no reversible error, the decree will be affirmed.

AFFIRMED.





631

20969.

LEOPOLD NATHAN,  
Appellant,

vs.

HARRY M. BROWN,  
Appellee.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

197 I.A. 533

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Leopold Nathan, appellant, hereinafter referred to as the complainant, filed a bill against Harry M. Brown, appellee, hereinafter designated as the defendant, asking for a construction and reformation of a certain agreement dissolving a partnership theretofore existing between said complainant and defendant; also for an injunction restraining the defendant from prosecuting a certain proceeding then pending in the Municipal Court of Chicago, and also enjoining the said defendant from instituting or prosecuting any further proceedings against the complainant on account of said partnership and the dissolution thereof.

\* The bill alleged that the complainant had been engaged in the real estate business for many years and ~~was also an expert in special assessment matters; that~~ <sup>therein</sup> in connection with such business he had for several years been conducting a certain branch of the real estate business under the name of Local Improvement and Taxpayers Association, (not incorporated); that he had known the defendant for many years prior to July 1, 1908; that prior

REF ID: A61561

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to ~~January 1, 1908~~ the defendant had been in business  
~~as a merchant tailor, but that from that time on until~~  
~~July 23, 1908, he was not in any business; that on said~~  
~~date the complainant and defendant entered into a partner-~~  
~~ship under a written agreement,~~ <sup>Part the 1st of part</sup> as follows, namely:

"ARTICLES OF CO-PARTNERSHIP".

"Entered into this 23rd day of July A.D. 1908, by and between Leopold Nathan, party of the first part, and Harry M. Brown, party of the second part, both parties of the City of Chicago, County of Cook and State of Illinois, Witnesseth:

"That, Whereas, the said Leopold Nathan is now doing business under the firm name of 'Local Improvement Tax Payers Association' of Chicago, and not incorporated; it is hereby agreed that all accounts now owing to the Firm or to L. Nathan shall when collected go to the said L. Nathan for his own use.

"It is further agreed that the moneys received from contracts for reduction of assessments signed prior to this date shall be the individual property of the said L. Nathan and any fee or fees that may be hereafter collected from said business shall go to L. Nathan for his own use.

"The parties have hereby further agreed ~~to continue this business and in addition~~ <sup>to</sup> ~~hereto shall~~ engage in the real estate business.

"On any business done, in real estate transactions and in any other business said firm shall agree to engage in under contracts signed after this date the profits shall be divided by the parties hereto share and share alike.

"All expenses and losses shall be paid by both parties hereto share and share alike.

"The said L. Nathan is to pay any and all debts heretofore contracted by the said Local Improvement Tax Payers Ass'n. The said Harry M. Brown having this day paid to the said L. Nathan the sum of Two Hundred Fifty (\$250.00) Dollars, the receipt of which is hereby acknowledged for an undivided one-half ( $\frac{1}{2}$ ) int rest in and to the office fixtures now in said office and owned by the said L. Nathan, and the good will of said business.

"This contract to be in force for a term of three (3) years from this date, unless dissolved by mutual consent.

~~"At the end of this Co-partnership the~~  
said L. Nathan shall have the exclusive right to use the name of the Local Improvement Tax Payers Association.

LEOPOLD NATHAN,  
HARRY M. BROWN."



300

divided by the number of units and  
multiplied by 100 to get the  
percentage. The result is the  
percentage of the total units  
that are in the category.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.



(copy)

That ~~th~~ <sup>hereafter</sup> the ~~said~~ business was conducted as a co-partnership; that about December 1908, defendant became dissatisfied with the results of the ~~business~~ but <sup>in writing</sup> that the partnership continued until about May 25, 1910, during which time all profits were divided according to agreement; that on May 25, 1910, they agreed <sup>in writing</sup> to dissolve partnership, ~~which agreement was evidenced in writing and is~~ as follows:

"DISSOLUTION OF CO-PARTNERSHIP.

"Whereas articles of co-partnership was entered into on the 23rd day of July, 1908, by and between Leopold Nathan and Harry M. Brown; and

"Whereas the said Nathan and Brown have mutually agreed to dissolve this co-partnership by mutual consent:

"It is hereby stipulated and agreed that all the assets of any kind and nature, all outstanding accounts, office fixtures, etc., and the good will of said business shall be the property of said L. Nathan for his own use and behoof forever;

"The said Leopold Nathan agreed to assume and to pay all liabilities of said firm, and for and in consideration of all interests in said firm heretofore owned by the said Harry M. Brown the said L. Nathan hereby agrees to pay to said Harry M. Brown Twenty-five (\$25) Dollars per week commencing on the 28th day of May, 1910, until the Thirty-first day of December, 1910; the said Harry Brown in lieu of this agreement to give such services as he may be able to give until said last named date.

"Dated at Chicago this 25th day of May, 1910.  
LEOPOLD NATHAN,  
HARRY M. BROWN."

The bill further alleged that the defendant, in accordance with ~~said~~ <sup>the</sup> dissolution agreement, was to enter and continue in complainant's employ until December 31, 1910, at a salary of \$25.00 per week, devoting all his time and energy to the promotion of said business; that the defendant continued in complainant's employ until July 1, 1910, when he ~~fell and~~ was injured, and up

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... of ... ..

2. Ergebnisse (Ergebnisse des Projekts, z.B. Ergebnisse der Erhebungen, Ergebnisse der Auswertung, Ergebnisse der Diskussion, Ergebnisse der Reflexion)

: NUMBER LINE TO 100

that the document contains the following information:

to which time he was paid a salary of \$25.00 per week; that thereafter the defendant rendered no service, ~~to the complainant and that under complainant's construction of the dissolution agreement he was not~~ entitled to receive any further sum of \$25.00 per week because he had rendered no further services up to and including the filing of the bill which was on ~~December 5, 1910.~~

The bill further sets forth that in October the defendant brought suit against the complainant in the Municipal Court for the sum of \$350.00, ~~said amount being~~ <sup>fewer</sup> the amount alleged to be due from July 1st to October 10th under the dissolution agreement; that on November 9, 1910, the defendant sued out an attachment in aid <sup>of</sup> ~~from~~ his ~~said~~ suit at law which he caused to be levied upon the real estate of the complainant, and that the defendant had otherwise attempted to harrass and injure complainant in his business and threatened to file additional suits from time to time until complainant should pay him the sum of \$350.00 ~~claimed to be due upon October 7th and continued to~~ pay him at the further rate of \$25.00 per week from said October 27th to December 31st, ~~and this notwithstanding the fact that defendant had wholly neglected and refused to perform any service whatsoever for complainant subsequent to July 1st, 1910, although he had~~ been well able to attend to business had he been so inclined, and that defendant had informed complainant that he did not intend to return or to perform any further service for complainant.





The bill further alleged that the dissolution agreement was ambiguous and capable of more than one construction.

Then follows <sup>ed</sup> the prayer that the dissolution agreement be construed so as to express the actual understanding of the parties, and that any and all liabilities of complainant, if any, be adjusted and adjudicated, and asking for an injunction restraining the defendant from further prosecuting the suit brought by him in the Municipal Court of Chicago, ~~already referred to~~  
~~xxxxxxx~~/and to enjoin him from instituting or prosecuting any further proceedings ~~against the complainant.~~

On December 5, 1910, an injunction was issued as prayed, ~~for~~. On December 12, 1910, the appearance of the defendant, by his solicitors, was filed and on December 13, 1910, on motion of defendant's solicitors the injunction ~~previously obtained~~ was dissolved and defendant allowed to file suggestion of damages within five days. ~~On the same day~~ complainant prayed an appeal to the Appellate court, which was allowed upon his filing a bond in the sum of \$1,000.00 and certificate of evidence within twenty days. The ~~appeal bond was filed and approved on the same day.~~

On December 19, 1910, suggestion of damages was filed by the defendant.

On November 1, 1911, defendant filed his <sup>by a check</sup>  
~~answer to the bill of complaint.~~ In ~~said answer~~ <sup>the</sup> defendant denied all the allegations ~~set forth~~ <sup>in</sup> in ~~said~~ <sup>the</sup> complaint, <sup>as</sup>  
save those with reference <sup>to</sup> to his entering into the partnership agreement and also the agreement of the dissolution



The first document is dated 1941 and is signed by

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The second document is dated 1941 and is signed by

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of said partnership. He admitted further the beginning of the suit in the Municipal court against complainant and the attachment suit in aid thereof.

To this answer the complainant filed a general replication on October 16, 1913.

On November 22, 1913, a stipulation was entered into that the hearing on the suggestion of damages in said cause be placed on the contested motion calendar for December 13, 1913.

On May 29, 1914, court entered the following decree:

"This cause having come on to be heard, upon the bill of complaint herein and the answer thereto of the defendant and the stipulation of the parties by their respective solicitors in open court, and the court having heard the evidence, both oral and documentary and the same having been argued by counsel for the respective parties and the court being fully advised in the premises doth find that it has jurisdiction both of the subject-matter and of the parties, that the said parties had entered into a contract of dissolution as set out in complainant's bill of complaint and that as a result of said contract there is due to the defendant the sum of Three Hundred Fifty (\$350.00) Dollars which includes not only the amount accrued at the date of the filing of the bill herein but all amounts accrued and to accrue thereafter under said contract.

"The court further finds that there is due to defendant for wrongful issuance of writ of injunction herein the further sum of \$100.

"It is therefore ordered, adjudged and decreed that the said defendant do have and recover from the said complainant the sum of \$450 together with all costs which said defendant has paid on account of said cause." \*

From this decree the complainant prayed an appeal, which was allowed upon the complainant filing a bond in the sum of \$700.00, to be approved by the court, or the clerk of this court, within twenty days,

1

From this source the following data were obtained:

and complainant was given sixty days in which to present and file his certificate of evidence.

In the record presented to this court no certificate of evidence appears. The praecipe of the record shows that the clerk was asked to prepare a complete transcript of the record in the above entitled cause. The clerk certifies that the record presented to this court is a complete transcript of the record as asked for in the praecipe. It is fair to presume, therefore, that no certificate of evidence was ever filed in said cause.

The main contention of the complainant is that the decree is not supported by any finding of fact therein or by any evidence in the record, or by the pleadings. While it is true that no certificate of evidence has been filed, yet, the complainant's bill and the answer of the defendant set forth sufficient admitted facts to warrant the finding in the decree that the complainant is indebted to the defendant in the sum of \$350.00. It is necessary to refer only to the agreement of the co-partnership and the agreement to dissolve the same, to warrant the said finding in the decree.

While the complainant alleges in his bill of complaint that said dissolution agreement is ambiguous and does not truly set forth the agreement of the parties, and asks that the same be reformed so as to express the actual understanding between the parties at the time of such dissolution, we cannot concur in that contention.



100-443887-1000

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THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION  
PUBLISHED WEEKLY  
535 N. Dearborn Ave., Chicago, Ill. 60610  
Subscription price: \$5.00 per year in advance.  
Single copies: 15¢.  
Acceptance for mailing at special rate of postage provided for in Section 1103, Act of October 3, 1917. Authorized by Act of October 3, 1917. Postage paid at Chicago, Ill., and at additional mailing offices.  
Postmaster: Send address changes in advance to JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 535 N. Dearborn Ave., Chicago, Ill. 60610.

1904-1905, 1906-1907, 1908-1909, 1910-1911, 1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 26

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Received 11 July 2002; accepted 11 July 2002

†The letters in the parentheses are the initials of the author.

doi:10.1017/S0022292412001907 Printed in the United Kingdom

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and have not felt any further reduction in the

*(continued from page 60)*

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The articles of co-partnership, themselves, show that the defendant paid \$250.00 for an interest in said business; that he was to receive one-half of the profits and that he was also to have an undivided one-half interest in the office fixtures and good will of said business. This agreement was to run for three years. At the time of the dissolution agreement it still had more than a year to run.

The clauses in the dissolution agreement, the construction of which is the subject matter of the controversy between the parties, are as follows:

"It is hereby stipulated and agreed that all the assets of any kind and nature all outstanding accounts, office fixtures, etc., and the good will of said business shall be the property of said L. Nathan for his own use and behoof forever;

"The said Leopold Nathan agrees to assume and to pay all liabilities of said firm, and for and in consideration of all interests in said firm heretofore owned by the said Harry M. Brown, the said L. Nathan then hereby agrees to pay to said Harry M. Brown, Twenty-five (\$25) Dollars per week commencing on the 28th day of May, 1910, until the Thirty-first day of December, 1910; the said Harry Brown in lieu of this agreement to give such services as he may be able to give until said last named date."

By these clauses the complainant became entitled to all the assets of the business, including the good will, and in consideration therefor, the said complainant agreed "to assume and pay all liabilities of said firm. \* \* \* to pay to said Harry M. Brown, Twenty-five (\$25.00) Dollars per week commencing on the 28th day of May, 1910, until the thirty-first day of

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December, 1910." This language clearly indicates that the Twenty-five Dollars (\$25) per week was to be paid for and in consideration of the said defendant's interest in said co-partnership. The complainant contends, however, that the following language "the said Harry Brown in lieu of this agreement to give such services as he may be able to give until said last named date", obligated the defendant to render services to the complainant for which he was to be paid \$25 per week.

Any such construction of this language absolutely obviates the force of the preceding language whereby the said complainant in consideration of the said defendant giving up all his interest in said co-partnership, agreed to pay the defendant \$25 per week from the 28th day of May, 1910, until the 31st day of December, 1910.

The contention of the complainant simply means that this interest was obtained without any consideration, save that he agreed to employ the defendant during that period of time at a salary of \$25 per week. Such construction of this contract is unreasonable and strained, and that such ~~xxxx~~ <sup>was</sup> ~~xxxx~~ the intention of the parties in making this agreement is absolutely improbable.

There was nothing ambiguous in the language of the contract, nor was there anything in the contract that needed reformation.

December, 1911. This January 1912, however, the  
 fact that the United States (U.S.) was not to  
 be held for the in consideration of the same matter  
 would be limited to such a question. The same  
 question, however, was not the same, but the same  
 language was used. There is a fact that the  
 agreement is now not signed as we will see in  
 the next part of the report, which is, however,  
 the language in which it is the same as  
 the same as it was in the same way.

The same question is the same as the same

language, however, the same as the same  
 the same as the same as the same as the same  
 in this report, however, the same as the same  
 the same as the same as the same as the same  
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The clause in the contract upon which complainant based his contention, construed most favorably to him, can be held to mean only that if defendant could render any service in connection with any transaction in which he (defendant) was concerned while a member of said co-partnership, he would do so. This is a far cry from the contention of the complainant that the defendant was employed at a salary of \$25 per week, for which he was to devote all of his time in the interest of the complainant in and to said business.

We are, therefore, of the opinion that the chancellor was warranted in finding from the record as it is presented to this court that the complainant was indebted to the defendant in the sum of \$350.00; in fact, as we view the record the chancellor should have found the complainant indebted in a larger sum. Complainant, however, cannot complain of such action by the court inasmuch as it is favorable to the interest of his client, nor can the defendant complain because he has not assigned a cross-error.

In this view of the case we are necessarily further of the opinion that the court properly dissolved the injunction granted on this bill. The complainant also complains of the allowance of \$100.00 as damages for the wrongful issuance of such injunction and bases his contention upon the fact that there is no evidence in the record supporting such finding in the decree, nor is there any sufficient finding of fact in the decree itself.



The change in the contract was with  
negotiation between the parties, and it was  
stipulated that the salary should be paid in  
advance of the service and service in connection  
with any transaction in which he (the witness)  
was concerned while a member of said association,  
he would be so. This is a fact and the witness  
of the complaint that the defendant was engaged in  
a salary of \$50 per week, for which he was to receive  
all of his time in the interest of the association  
in and to such business.

It was, therefore, at the time that the  
association was organized in 1910 from the records  
as it is presented to this court that the association  
was subject to the contract in the year 1910;  
in fact, as we also find from the evidence that  
the contract was signed and entered in a book which  
the witness, George F. Smith, testified he had signed  
by the court inasmuch as it is necessary to the contract  
of the contract, not only the defendant's signature  
he has not signed a contract.

It was also at the time that the witness  
testified that the contract was signed and entered  
the defendant's signature on the 1910. The witness  
also testified at the time of the trial of 1910 that  
for the purpose of the contract of the association and before  
the contract was signed that the defendant was not  
in the record supporting such evidence in the record,  
not in there any evidence showing at that time  
George Smith.

The record, however, does show that an injunction was issued; that the court found it was improperly issued and dissolved the same and that suggestions of damage, under leave of court, were filed.

The court in its decree found as a fact that there was due to the defendant for the wrongful issuance of the writ of injunction in said cause the sum of \$100.00. This is a sufficient finding of fact upon which to base a decree adding said sum of \$100.00 to the amount the complainant was entitled to recover from the defendant.

Finding no reversible error, the decree of the Circuit Court will be affirmed.

AFFIRMED.

The record, however, does show that in 1941  
 January was issued; that the next month it was 1942  
 January was issued and signed by the same person.  
 Questions of course, about this is not, with  
 this.

The report on the record shows that in 1941  
 that there was one in the document the last month.  
 The document of 1941 was in the document in 1941.  
 Since the year of 1941, this is a possibility.  
 Finding it that there was in 1941 a document which  
 said was in 1941.00 to the month and the document  
 was revised to prevent from the document.

Findings as revealed in 1941, the document  
 of the document will be revised.

Exhibit.

JAMES A. WICKY,  
Appellee,

vs.

EDWIN L. FRED & COMPANY,  
Appellant.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 539

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellee, hereinafter referred to as plaintiff, recovered judgment against appellant, hereinafter referred to as defendant. It appears from the evidence that in November, 1913, plaintiff was employed by defendant to go to Indianapolis to work for a street car company during the continuance of a strike that was then in progress. His <sup>76</sup>written contract provided that he was to receive \$7.00 a day, board, lodging and transportation, and for these items he recovered a judgment. Apparently none of the men taken to Indianapolis <sup>mainly</sup> did more than to report for work and hold themselves <sup>ready</sup> to take out cars when ordered to do so. It ~~was~~ admitted that plaintiff reported ~~for work~~ Saturday and Sunday after arriving in Indianapolis. The defendant's assistant superintendent testified that he discharged plaintiff <sup>the</sup> following day, and ~~is~~ is corroborated by the testimony of other employees of the defendant. Plaintiff testified that he reported ~~for work~~ every day during the strike and was regularly checked <sup>and</sup> by defendant's employees. He ~~is~~ <sup>was</sup> corroborated by the testimony of one fellow-employee, called in his behalf. Defendant's superintendent testified that beginning with Monday, no check mark appeared after plaintiff's name; that a cross was <sup>then</sup> placed after plaintiff's name ~~on that day~~, and the notation "open number." The time-keeper testified that an employee was checked when he presented his card; that the sheets offered in evidence were carbons of the originals; that the checks were not put

1871-72

1872-73

1873-74

1874-75

1875-76

1871-72

1872-73

1873-74

1874-75

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1877-78

1878-79

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1886-87

1887-88

1888-89

1889-90

1890-91

1891-92

1892-93

1893-94

1894-95

1895-96



on the sheets before the parties came to the barn; and that <sup>where</sup> ~~in the case of a man who~~ <sup>upset</sup> ~~did not present himself.~~ <sup>a cross was</sup> ~~they~~ placed ~~a cross~~ after his name. ~~A careful~~ <sup>ed</sup> Examination of the carbon sheets shows <sup>ed</sup> that plaintiff was regularly checked each day <sup>by the same</sup> in ~~identical~~ <sup>the same</sup> manner as ~~were~~ <sup>ed</sup> the other employees. A vertical mark appears through these check marks, and the notation "open number" appears <sup>ed</sup> in lead pencil. ~~Examination of~~ <sup>ed</sup> the vertical marks it is <sup>by</sup> obvious ~~that they were~~ <sup>did</sup> not <sup>appear to be</sup> made by an impression through the carbon paper, but ~~were~~ <sup>made</sup> some time after the original entry. ~~The~~ <sup>ed</sup> time sheets, therefore, tend to corroborate the plaintiff.

Plaintiff furnished his own board and lodging, and was allowed to recover for the expense incurred, presumably upon the ground that no suitable lodging and board were furnished by the defendant. There is a conflict of evidence on this point. Upon a careful review of the record, it is impossible to say that the finding of the court was manifestly against the weight of the evidence.

Defendant also contends that parcel evidence in regard to the terms of the contract was improperly admitted. Plaintiff had served due and timely notice upon the defendant to produce at the trial the written contract which was in its possession, but at the time plaintiff testified it had not been produced. There was, therefore, no error in the court's ruling. In view of this state of the record, the judgment must be affirmed.

AFFIRMED.



A. W. TODD,

Defendant in Error.

vs

CHICAGO CITY RAILWAY COMPANY,

Defendant in Error.

and AUTO TAXICAB COMPANY,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

197 I.A. 544

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendant in error, A. W. Todd, recovered a judgment against the plaintiff in error, Auto Taxicab Company, for personal injuries. The parties will be designated as plaintiff and defendant as in the court below. About midnight, September 11, 1911, plaintiff entered a taxicab of the defendant at the Illinois Athletic Club in Chicago, and instructed the driver of the taxicab to take him to the Lake Shore railroad station. The driver proceeded south on Michigan avenue, and then turned west on Jackson boulevard. While crossing State street, which is two blocks west of Michigan avenue, the taxicab collided with a southbound street car. The plaintiff was injured, being cut about the head, and an artery in the region of the temple was covered. He was removed from the taxicab and taken back to the Athletic Club, where he received medical attention. He stayed at the club the balance of that night, the next day and night, and on the following day, against the advice of his physician, he went to Atlantic City, and a few weeks afterwards came back to Chicago by way of Indianapolis. He was a traveling salesman for a lumber company of St. Louis, and was earning more than \$10,000 per year. He was unable to work for more than three months after the accident. October 24, 1911, plaintiff brought suit against the defendant, Auto Taxicab Company, and the Chicago City Railway Company. The jury returned a verdict for \$2500 against the Auto Taxicab Company. The street car company was found not guilty. Judgment was entered on the verdict. The





death of the plaintiff has been suggested to this court and on motion his administrator has been substituted.

The defendant contends that the court committed reversible error in refusing three instructions offered on behalf of the defendant. The first instruction told the jury that the law did not require the driver of the taxicab to guard against anything which was not reasonably to be expected, nor did the law require him to regulate his conduct with reference to any conduct of others not reasonably to be expected by him, under the circumstances in evidence. This instruction might have been proper if the suit had been brought by the taxicab driver against the street car company, as held in Chicago City Ry. Co. v Soszynski, 134 Ill. App. 149, but was not applicable where the suit was brought by a passenger riding in the taxicab. Parmelee Co. v Wheelock, 224 Ill. 194.

By the second instruction which the court refused, the jury were instructed that the plaintiff was not entitled to recover any damages for any disability or expense that resulted from his own failure to exercise proper and reasonable care after he received the injury, which aggravated his condition by failing to observe the instructions of his physician, and that the defendant was not responsible for any damages resulting from any neglect on the plaintiff's part. This instruction was clearly bad. It assumes that the plaintiff had done something which aggravated his physical condition, and thereby invaded the province of the jury.

Instruction No. 3, which the court refused, correctly stated the law to be that, in the absence of some warning or evidence to the contrary, the driver of the taxicab had a right to assume that the railway company would obey the ordinance of the South Park Commissioners and stop its car before crossing the boulevard; but, in applying this principle to the





facts, the instruction merely stated that the jury "should consider that the chauffeur had a right to assume that the car would stop," but did not say, assume "in the absence of some warning or evidence to the contrary," which qualification was, of course, necessary to the correctness of the instruction.

North Chicago St. R. R. Co. v Irwin, 202 Ill. 345; Brun v Nacey Co., 267 Ill. 353; L. N. A. & C. Ry. Co. v Patchen, 167 Ill. 204.

The defendant next contends that the hypothetical question put to Dr. Harvey, a witness who testified on behalf of the plaintiff, and the doctor's answer to the question, were improper, in that the question "called for an answer which invaded the province of the jury." The objection urged on the trial to the question was: "It is not a proper hypothetical question. The premises are not hypothetical. The mentioning of Mr. Todd's name, that of the Illinois Athletic Club, and the mention of all the facts and circumstances directly mentioned in this case detracts from the question and the hypothetical character of it." It therefore clearly appears that the objection here urged was never called to the attention of the trial court. It is a rule of universal application that an objection is limited to the grounds specified and does not cover others not specified. First National Bank of Haywood v Gerry, Gen. No. 20971, Appellate Court, First District; Even v Wilbor, 308 Ill. 492. An objection cannot be urged for the first time in a court of review. Furthermore, the question and answer under the facts in the case were proper. Defendant objects to the conclusion of the question and the witness's answer, which are as follows: "Have you an opinion, doctor, as to whether or not the injury that Mr. Todd received in the taxicab had any connection with Mr. Todd's condition as you found it when you made the examination?" A. "That his condition

facts, the distinction merely seemed from the fact that the  
 either that the quantity was a "fact of nature" and the  
 would stop," but his own way, however, in the manner of  
 writing or speaking in the matter, "and the distinction was  
 of course, necessary to be maintained in the treatment  
North Dakota vs. E. I. Co. v. E. I. Co. and E. I. Co. v. E. I. Co.  
South Co. v. E. I. Co., E. I. Co. v. E. I. Co., E. I. Co. v. E. I. Co.  
 187 Ill. 204.

The statement that contains the following  
 question put to Dr. Harvey, a witness, was: "Did you  
 of the plaintiff, and the defendant's answer to the question  
 were important, in that the question "Did you or  
 which involved the question of the fact?" The question was  
 on the trial to the question was: "Is it not a fact that  
 (actual question, the answer was not hypothetical, the  
 testimony of Mr. Tully's name, that of the Illinois  
 Chief, and the question of all the facts and circumstances of  
 really involved in this case, facts from the evidence and  
 the hypothetical question of it? Is it not a fact that  
 facts that the question was asked and asked in the trial  
 question of the trial court. It is a fact of common  
 fact that the question is limited to the facts and circumstances  
 case not covered above and hypothetical. North Dakota vs. E. I. Co.  
North Dakota vs. E. I. Co., North Dakota vs. E. I. Co., North Dakota vs. E. I. Co.  
North v. E. I. Co., 187 Ill. 204. In North v. E. I. Co.  
 the first time in a court of review. North v. E. I. Co.  
 and answer which the facts in the case were. North v. E. I. Co.  
 object to the conclusion of the question and the answer  
 answer, which was as follows: "Did you or not, answer, as  
 to whether or not the fact was. North v. E. I. Co.  
 fact had any connection with Mr. Tully's name and the  
 fact is then you made the statement?" North v. E. I. Co.



was dependent upon the injury." There is no dispute as to the manner in which the plaintiff was injured, and under the doctrine announced in the case of City of Chicago v Didier, 227 Ill. 571, and the cases therein cited and analyzed, the question and answer were not objectionable.

The defendant's next contention is that the court erred in refusing to allow the driver of the taxicab in question to state what his practice was, with reference to observing the provisions of the ordinance of the South Park Commissioners, prior to the accident, and in support of this contention cites Toule v Pacific Imp. Co., 98 Cal. 342; Smith v Middleton, 112 Ky. 588; Jagger v Bank, 53 Minn. 386. The first of these citations sustains the contention of the defendant, but the last two are adverse to it. On reason and authority, the ruling of the trial court was clearly proper. It was immaterial what the witness had done on prior occasions. The only proper inquiry was what he did at the time and place in question. Smith v Middleton, supra; Jagger v Bank, supra.

It is next contended that the court erred in permitting the plaintiff to file additional counts to the declaration, in that they set up different causes of action from that declared on in the original declaration, and which causes of action were barred by the statute of limitations. During the progress of the trial, November, 25, 1913, the plaintiff asked and was given leave to file an additional count over the objection of the defendant, and again on December 1, 1913, the cause being still on trial, the plaintiff was given leave to file another count to the declaration instanter, and the pleas then on file were ordered to stand as pleas to this count. No objection was to the entry of this order. Assum-





ing that these two counts set up different causes of action from that declared on in the original declaration, the defendant is no position to complain, for he failed to file a plea setting up the statute of limitations, and it has been repeatedly held that this is the only/<sup>way</sup>in which the question can be saved. Heimberger v Eliot Switch Co., 245 Ill. 448; Hougland v Avery Coal Co., 246 Ill. 609; Wall v C. & O. R. R. Co., 200 Ill. 66; Guntton v Hughes, 181 Ill. 132.

The next contention urged by the defendant is that the court should have sustained the motion in arrest of judgment on the ground that it was averred in the declaration that "it then and there became the duty of the said defendant, Auto Taxicab Company, to use the highest degree of care consistent with the operation of said taxicab to safely convey this plaintiff", etc.; that this statement of the duty of the defendant was incorrect; that the duty of the defendant was only to use the highest degree of care consistent with the reasonable or practical operation of the taxicab. No instruction embodying this proposition was submitted by the defendant, and if it desired to raise the objection to the declaration that it now urges, the proper procedure would have been to file a special demurrer. The declaration is sufficient to sustain the judgment, and this is all that is required after verdict. Sargent v Baublis, 215 Ill. 423.

The defendant further contends that the judgment is excessive. The evidence conclusively shows that the plaintiff suffered great pain and was unable to attend to his affairs for over three months. His earnings prior to the injury had averaged nearly \$1000 per month. In our opinion the evidence justified the amount of the verdict. The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.



325 - 20655.

DRAVO DOYLE CO., a Corporation,  
Defendant in Error.

vs.

SULZBERGER & SONS CO., a Corporation,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 547

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case seeks to review the record of a judgment for \$387.80 rendered in the Municipal Court of Chicago in favor of the defendant in error, hereinafter called the plaintiff, and against the plaintiff in error, hereinafter called the defendant.

*June 1912*  
\* In June, 1912, and for some time prior thereto, the defendant ~~had been operating~~ <sup>Chicago</sup> a steam turbine at its plant in the stockyards <sup>of Chicago</sup>. The defendant, in June, 1912, purchased from the plaintiff certain gears ~~which were to be used in connection with the turbine.~~ The action in this case was brought to recover for a balance due on account of the purchase price of the gears.

It appears <sup>from</sup> the evidence that the gears were ordered in June, 1912, delivered in July, 1912, and installed by the defendant <sup>defendants</sup> in its plant, at the stockyards. After they <sup>gears</sup> were in operation for a period of from four to six weeks, some of the teeth broke. The <sup>gears</sup> were then taken by the defendant <sup>defendants</sup> to its machine shop, turned down on a lathe, the broken parts removed and then

1901 - 1902

WIND DIRECTION, a compass rose, indicating N, S, E, W.

WIND VELOCITY, a scale from 0 to 100.

# THE ALICE

THE ALICE, a small sailing vessel, was built in 1901.

The Alice was built in 1901, and was built in 1901.

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replaced and ~~were~~ used at intervals thereafter. After <sup>break</sup> they ~~were~~ broken, the ~~matter was taken up by the defendant~~ <sup>took the matter up</sup> with the plaintiff; the defendant claiming that the gears were inherently defective, ~~that this defect caused the~~ <sup>was</sup> break, and that the gears should, ~~therefore~~, be replaced without cost. ~~On the other hand~~, the plaintiff contended that the trouble was caused by reason of a faulty foundation on which the turbine was placed. After some controversy ~~between the parties concerning this matter~~, the plaintiff, on August 14, 1912, wrote the defendant ~~the~~ <sup>a</sup> following letter ~~X~~ \*

"Replying to your valued favor of the 13th instant, it seems very likely that the damage to the gears of the DeLaval turbine in this instance has been due to exactly the same cause as in previous breakdowns. As we have previously stated, accidents of this kind are almost unheard of where the turbines are resting on a proper foundation. It is extremely unfortunate that you did not go ahead and put this turbine on a new foundation before starting it up, and it would seem to us that your past experience with this machine would certainly have prompted you to put it on a substantial foundation before putting it into operation.

"If you still believe that the trouble was due to imperfect material and can find some evidences of the same, we would suggest that you might ship that part to the factory at Trenton, N.J., where a careful inspection of the same can be made. This is in accordance with the DeLaval Co.'s custom in connection with such claims. The damaged part will be given a thorough inspection and test in the laboratory and if they find evidence of defect, will doubtless be willing to replace the same.

"We understand that you have turned off the damaged teeth and will put the machine in operation under its present condition. We doubt very much whether the machine will give you any service in its present location, but if put on a new foundation, we are inclined to believe that the gears in their present condition might last for a considerable period of time."

~~Afterwards~~, <sup>+</sup> ~~In~~ accordance with the foregoing letter, the defendant sent the broken parts of the gears to Trenton, N.J. and on October 16, 1912, plaintiff wrote ~~a letter~~ <sup>at</sup> to the defendant advising ~~the letter~~ that after



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an examination of the broken parts of the gears, there was no evidence of inherent defects, and ~~that~~ therefore no credit or allowance could be made ~~for the broken parts.~~ <sup>+</sup>  
*Defendant*  
Plaintiff having refused to pay for the gears, this action was brought. At the close of all the evidence, the court instructed the jury to find the issues for the plaintiff.

① The gears in question were manufactured at Trenton, New Jersey, by the DeLaval Steam Turbine Company. ② The plaintiff contends that it purchased the goods from the De Laval Company and sold them to the defendant, while the defendant contends that the plaintiff was merely the agent of the DeLaval Company; that any claim for the purchase price of the goods in question must be made by the latter company; that the only reason the suit was brought by the plaintiff, and not by the DeLaval Company, was that the DeLaval Company being the manufacturer, there was an implied warranty that the gears were fit for the purpose for which they were to be used by the defendant, and that as they were inherently defective, there was a breach of such warranty which could be interposed as a defense against the DeLaval Company, but which defense could not be made as against the plaintiff, it not being the manufacturer. It is conceded that in this case ~~there~~ was no express warranty of the gears. <sup>+</sup> It has been held in this State that there is no implied warranty as to quality by a vendor who is not a manufacturer. (Borden & Selleck Co. v. Fraser & Chalmers, 118 Ill. App. 655; Martin & Co. v. Roehm, 92 Ill. App. 87; Archdale v. Moore,



19 Ill. 565; Kohl v. Lindley, 39 Ill. 195.) In Telluride Power Co. v. Crane Co., 208 Ill. 218, the court said, (p.227):

"The rule is that if an article is to be made or supplied to the order of a purchaser there is an implied warranty of the fitness of the article for the special purpose designated by the buyer, if that purpose be known to the vendor; but in the bargain and sale of an existing chattel there is not, in the absence of fraud, and implied warranty of good quality or condition of the thing sold. (Benjamin on Sales, sec. 647; Mechem on Sales, secs. 1312-1316; Kohl v. Lindley, 39 Ill. 195; Misner v. Granger, 4 Gilm. 69; Carondelet Iron Works v. Moore, 78 Ill. 65.)"

Both parties to this controversy cite the Telluride case, supra. The plaintiff contends that under the rule announced in that case, where there is a sale of an existing chattel, there is not, in the absence of fraud, an implied warranty of good quality or condition of the thing sold, and that as the defendant ordered "the gears they have in stock at the present time," the sale was of an existing chattel, and therefore there was no implied warranty. On the other hand, the defendant contends that that case holds that where the article is to be "supplied" to the purchaser, there is an implied warranty of the fitness of the article for the purpose designed by the buyer, if such purpose be known to the vendor; that in the case at bar, the gears were to be supplied to the order of the purchaser for a special purpose which was known to the vendor, and that this was sufficient to show an implied warranty of the goods.

In the view we take of the case, we shall assume that there was an implied warranty by the plaintiff of the



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gears in question, and that there was a breach of such warranty.

Where there is a sale and delivery of personal property with an express or an implied warranty, if the property is found to be defective, the purchaser may keep and use the property and sue for damages on a breach of the warranty, or when sued for the price, he may recoup such damages. (Underwood v. Wolf, 131 Ill. 425.) In that case, the court said, (p.435):

"Where there is a sale and delivery of personal property in presenti with express warranty, and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of the warranty, or, when sued for the purchase price, he may recoup such damages under the general issue, or set them up in a special plea of set off. This is a well settled rule."

Where there is a warranty of goods sold, without fraud, and the goods have been accepted and there is no stipulation in the contract that they may be returned, the vendee has no right to annul the contract without the consent of the vendor, for a breach of the warranty. But when he is sued for the purchase price, he may recoup the damages sustained by reason of the breach or warranty.

(Doane v. Dunham, 65 Ill. 512; Farris v. Alfred, 158 Ill. App. 158; Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198.)

The measure of damages for breach of warranty is the difference between the value of the article as warranted, and its actual value in its alleged defective condition.

(Mayer v. Automobile Exchange, 125 Ill. App. 648; Skinner v. Mulligan, 56 Ill. App. 47.)

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In the case at bar, the gears were sold and delivered, and there is no contention that there was any fraud connected with the sale of the gears. The defendant, therefore, could not annul the sale by returning the goods without the consent of the vendor. The defendant, however, contends that it returned the goods at the request of the plaintiff, and that the plaintiff cannot now be heard to say that the gears were not properly returned. The defendant further argues that the goods were to be returned, and "if there was a breach of warranty the gears were to be replaced," and that evidence of this fact is to be found in the letter of August 14, 1912, above quoted. In this contention, we cannot concur. There can be no dispute but that the plaintiff in the said letter suggested that the gears be returned to the DeLaval Company by the defendant, and that if the said company found them inherently defective it would doubtless be willing to replace them. The evidence, however, shows that the plaintiff advised the defendant that no such defects were found. No evidence was introduced tending in any manner to show the amount of the damages sustained by the defendant on account of the alleged breach of the implied warranty, and there being no evidence that the sale was annulled, there was nothing for the court to submit to the jury.

Finding no substantial error in the judgment of the Municipal Court, it will be affirmed.

AFFIRMED.





550 - 20883.

ADAM LOSSECHWICH,  
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

197 I.A. 557

STATEMENT BY THE COURT. This is an appeal from a judgment of \$2500, entered in the Superior Court of Cook County, in favor of appellee and against appellant, for personal injuries received by appellee. The parties hereafter will be designated plaintiff and defendant as in the court below.

*time* ~~The facts are these:~~ *Happened that* The plaintiff had been *was* employed by the defendant as a laborer in cleaning and sweeping cars at the defendant's barns located between 69th and 70th streets in the City of Chicago for *some a long* ~~than three years~~ prior to the time he was *him* injured, April 26, 1911. He also swept around the barn and offices, and when ordered, ~~he would take a car out on some part~~ of the line, where a car had become *him* disabled, and ~~turn~~ *turn* ~~the same~~ *it* over to the regular street-car men. In doing this work he acted as motorman. ~~In working around the~~ barn, although not instructed, ~~by anyone,~~ he became sufficiently familiar with the mechanism and operation ~~of the cars to do the above work.~~ The barn where the accident occurred extended from 69th to 70th streets and *and was* from Ashland boulevard *about* one block in width. It was



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divided into seven bays by brick partitions extending north and south from 69th to 70th streets. In each bay there were three tracks extending <sup>to</sup> the entire length. ~~These tracks~~ <sup>which</sup> were connected with the tracks ~~in~~ in the streets. There were doors in the ~~various~~ partitions ~~which~~ <sup>which</sup> connected the different bays, ~~with one another.~~ About halfway between 69th and 70th streets there <sup>was a</sup> ~~was~~ long pits about four feet in depth under ~~the several~~ tracks. These pits were ~~constructed~~ to enable the repair man to inspect and repair the cars, ~~which came in the barn from 70th street.~~ As the cars came in they were cleaned and inspected, put in condition and moved to the north end of the barn near 69th street, from where they would be taken out when needed, ~~on the various streets.~~ The barn was in constant operation. There were day and night shifts. Twenty-eight men were in the night shift, including the plaintiff. The evidence <sup>all</sup> tends to show that about 8 o'clock on the night of ~~the~~ <sup>the</sup> accident, April 26, 1911, the car in question was inspected and put in repair by an employe ~~of the defendant~~ named Little. After the car had been put in condition, Little ordered his helper Gedraitis to move the car to the north end of the barn at 69th street, which he did. The car was left just outside of the barn where it remained for about two and one-half hours, when the night foreman told the plaintiff to take a car out "right away" to 59th street, where some trouble had occurred, and as was the custom, ~~the~~ <sup>and</sup> plaintiff ~~was told~~ to take a helper, ~~with him.~~ These helpers were ~~sometimes~~ known as trolley boys, and part of their duty was to stand on the back platform during the trip. Plaintiff called a helper and ~~they~~ both started towards the car, plaintiff reaching it first. The helper went to take a sign off the car, and plaintiff stepped in



behind the car and adjusted the trolley. As soon as the trolley came in contact with the wire, the car backed up and plaintiff was caught between the car and another one standing ~~a few feet immediately south~~ on the same track. One of his legs was crushed above the knee. As he fell ~~to the ground~~, he pulled the trolley pole from the wire and the car stopped. The mechanism of the car was in such position that the car would back up when the trolley was placed on the wire. There ~~is~~ <sup>was</sup> no direct evidence as to how the mechanism came to be in this position. It was the custom, when cars were standing on the tracks, ~~to leave the power off and~~ <sup>to leave</sup> the car "dead". There were two kinds of cars known as small ~~cars~~ and big cars. The car in question was a small car, and the spring on the trolley pole was stiffer than on the larger cars. <sup>So</sup> ~~that account~~ it was difficult to place the trolley pole against the wire without standing behind the car. The evidence also tends <sup>ed</sup> to show that it was the custom for either the helpers or the ~~man who acted as~~ motorman to adjust the trolley pole when a car was to be taken out, ~~on the line~~; and to stand behind the cars, especially the small ones, in so doing. There ~~is~~ <sup>is</sup> no evidence that anyone was near the car in question from the time it was placed at the entrance of the barn ~~by Gedraitis,~~ <sup>by Gedraitis,</sup> ~~about 8:30 o'clock,~~ until the time of the accident, about 11 o'clock, except that given by the witness Daukintis who testified that fifteen minutes before the accident he saw the night foreman, ~~Mr. Conan,~~ <sup>Mr. Conan,</sup> come out of the back end of the car in question. ~~Conan~~ <sup>Conan</sup> denied this and testified that he had not been near the car for an hour or two. \*

+ The declaration was filed October 27, 1911, and consisted of but one count. It averred in substance that







the defendant was operating street cars and a barn in connection therewith; that a foreman was in charge of the work in the barn <sup>and</sup> of the employees including the plaintiff, which foreman was not plaintiff's fellow servant, but was a direct representative of the defendant; that the defendant caused the trolley pole on one of its cars to be removed from the trolley wire and permitted and allowed the mechanism of ~~said~~ <sup>the</sup> car to be and remain in such condition and position that if the trolley were placed in contact with the wire the car would move backwards and against another car standing on the same track; that the defendant knew this, or by the exercise of ordinary care, would have known it; that the plaintiff did not know <sup>the</sup> ~~the~~ fact, and by the exercise of ordinary care, would not have known it; that, although the defendant knew of these facts, the foreman "ordered, directed, commanded, allowed and permitted the plaintiff to go between" the cars to place the trolley pole in contact with the wire, and negligently and carelessly failed to warn or advise the plaintiff of the condition in which the car was standing and the plaintiff, while in the exercise of ordinary care for his own safety, in the performance of such order, direction or command, was injured, etc. The defendant pleaded the general issue. ~~September 1913, the case came on for hearing before a court and jury, and during the trial plaintiff, by leave of court, filed an additional count. It averred in substance that the defendant operated certain street cars and barn in connection therewith; that it negligently and carelessly caused the trolley pole of one of its cars to be removed from~~

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connection with this; that a person was in charge of  
the work in the form of the <sup>1911</sup> company and  
plaintiff, which person was an employee of the  
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tried were placed in a position in which they were not  
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the wire, and permitted and allowed the mechanism of the car to be and remain in such condition and position that in the event that the trolley pole should be placed in contact with the wire, the car would move backwards and against another car standing on the same track so that the first mentioned car was not reasonably safe, but dangerous and unsafe; that the defendant knew, or by the exercise of ordinary care, would have known of the condition in which the car was standing; that the plaintiff did not know and by the exercise of ordinary care would not have known of such condition; that the plaintiff in the discharge of his duty <sup>went</sup> between the cars to place the trolley pole in contact with the wire, and as he did this, the car, by reason of the carelessness and negligence of the defendant, moved backwards and injured the plaintiff. To this count, the defendant filed pleas of the general issue and statute of limitations. A demurrer was sustained to the latter plea. Defendant elected to stand by said plea. † The jury disagreed. The second trial resulted in a verdict and judgment for \$2500, from which the present appeal is prosecuted.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendant urges four reasons why the judgment should be reversed: (1) that the additional count stated a different cause of action from that charged in the original declaration, and that the plea of the statute of limitations should have been held good as to such additional count; (2) that there was no proof

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of the negligence alleged in the declaration or in the additional count; (3) the proximate cause of the accident was plaintiff's own negligence; and (4) the court erred in giving instruction No. 6, requested by the plaintiff.

Where an amendment to a declaration sets up a new and different cause of action from that stated in the original declaration, after the period of limitation has run, the statute of limitations may be pleaded in bar.

Bradley v. Chicago - Virden Coal Co., 231 Ill. 622; C. B. & Q. R. R. Co. v. Jones, 149 Ill. 361. In such case the new or different cause of action is treated as to the commencement of a new suit. C. B. & Q. R. R. Co. v. Jones, supra. But where such amendment states no new matter or claim, but merely restates in a different form the cause of action set up in the original declaration, it relates back to the commencement of the suit, and the statute of limitations is arrested at that point. C. B. & Q. R. R. Co. v. Jones, Supra; Chicago City Ry. Co. v. McMeen, 206 Ill. 108. Whether the cause of action stated in the original declaration and that in the amendment or additional count are the same or different causes of action, must be determined, as a question of law, by an inspection of the pleadings alone. Heffron v. Rochester German Ins. Co. 220 Ill. 514; Metropolitan Life Ins. Co. v. The People, 209 Ill. 42.

The defendant contends that the original declaration based the right of recovery on the specific negligence of a particular servant, while the additional count charges the defendant with negligence generally, and that "evidence to sustain the original declaration would not sustain the



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additional count, nor could evidence which would constitute a defense to the original declaration be relied upon as a defense to the additional count." Among other authorities the cases of C. & E. I. R. R. Co. v. Driscoll, 176 Ill. 330 and Wabash R. R. Co. v. Bhymer, 214 Ill. 579, are cited. In the case of C. & E. I. R. R. Co. v. Driscoll, supra, it was held, where the declaration charged negligence of a vice-principal in giving an order, that liability was limited to the acts of said vice-principal, and that the defendant would not be liable for a breach of the general duty which it owes to a servant. The court there said (p.336): "The rule is fundamental that a plaintiff must recover, if at all, upon the case made by his declaration, and in the application of this rule to actions for negligence, the plaintiff cannot allege a specific act of negligence and recover upon proof of negligence of a different character." In Wabash R. R. Co. v. Bhymer, supra, the court said (p.586): "One of the tests by which it is determined whether different counts constitute the same cause of action or different causes of action is whether the same evidence will support the different counts." On the other hand the plaintiff contends that the original declaration was double, in that it stated several causes of action, and that the amended count stated but one of such causes of action; that where two or more causes of action are stated, it is sufficient if the proof establishes but one of such causes. This has long been the law in this state. The Weber Wagon Co. v. Kehl, 139 Ill. 644. In Deering v. Barzak, 227 Ill. 71, the court said (p.75): "The gist of



the cause of action in the original declaration, and also in the amended second count, is, that appellants negligently failed to use reasonable care to furnish appellee a reasonably safe place to do the work required of him by the or of appellants' foreman. The averment in the original second count, that the gangway was obstructed by order of appellants' foreman, did not state any different cause of action from that stated in the first original and second amended counts, which aver that the gangway had been obstructed with the knowledge of appellants' foreman. The cause of action, as stated in both instances, is the same, and each count grows out of the alleged failure of appellants to furnish the appellee a reasonably safe place in which to work." In the case at bar the gist of the cause of action in the additional count was the failure of the defendant to furnish the plaintiff a car in a reasonably safe condition. The same cause of action was also covered by the original declaration. It, therefore, follows that the demurrer to the plea of the statute of limitations was properly sustained.

The defendant's next contentions are that there was no proof of the negligence alleged in either the original or additional counts, and that the proximate cause of the accident was the plaintiff's own negligence. We have above set forth the principal facts which the evidence tends to establish. The law charged upon the defendant the positive obligation to furnish the plaintiff cars in a reasonably safe condition. Chicago U. T. Co. v.



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Sawusch, 218 Ill. 130; Schumann v. Nealiff, 178 Ill.App. 254; Jenkins v. Coal Co., 182 Ill. App. 36. The jury were instructed that before the plaintiff could recover he must prove, among other things, by a preponderance of the evidence, that he was in the exercise of ordinary care for his own safety; that he did not know and by the exercise of ordinary care and caution, would not have known, of the condition or position in which the car stood at the time of the accident, and that the defendant knew, or by the exercise of ordinary care and caution, would have known, that the car was standing in an unsafe condition. The jury by their verdict determined all these questions in favor of the plaintiff and against the defendant, and we cannot say that such finding is clearly and manifestly against the weight of the evidence.

The defendant next contends that the court erred in giving instruction No. 6, requested by the plaintiff, because it is not applicable to the facts in the case. In our opinion there is no merit to this contention.

Finding no substantial error in the record, the judgment of the Superior Court of Cook County will be affirmed.

AFFIRMED.



21197

WM. KONTOS,  
Plaintiff in Error,

vs.

WM. CLEMENS, ROBERT McLAUGHLIN,  
MATHEW KERSTING, CHAS. F. HEALY,  
et al,  
Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 563

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

The writ of error in this case seeks to review the record of a judgment of the Municipal Court of Chicago, entered in a fourth class contract case. The parties will be designated plaintiff and defendants as in the court below. Plaintiff brought suit against the defendants for damages for the breach of a contract, the amount claimed being \$425. After issues were formed the case was heard before the court without a jury and judgment was entered in favor of the plaintiff and against the defendant McLaughlin for \$425. The court found in favor of the other defendants. The writ of error in this case was then sued out by the plaintiff.

On motions of the defendants this court heretofore struck from the record the bill of exceptions, which in fact was a stenographic report, or statement of facts, for the reason that the same had not been filed within the time allowed by the trial court. All of the assignments of error are based on such stenographic report. There is, therefore, nothing for this court to pass upon, and the judgment of the Municipal Court will be affirmed.

AFFIRMED.

CONTINUED

STANDARD 11-1954

37. 10/1/93

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Defendants in Court.

1071 11 23 1971

303. After

to receive the services provided by the State.

1945

The writ of error in this case seems to review the record of a judgment of the Municipal Court of Chicago, entered in a fourth class contract case. The parties will be designated plaintiff and defendant as in the court below. Plaintiff brought suit against the defendant for damages for the breach of a contract, the amount claimed being \$450. After issues were framed, the case was heard before the court without a jury and judgment was entered in favor of the plaintiff and against the defendant notwithstanding the writ. The court found in favor of the other defendants. The writ of error in this case was then issued out by the plaintiff.

nothing for this court to pass upon, and the judgment of the  
Municipal Court will be affirmed.



312 - 20641

PATRICK C. FLYNN,  
Plaintiff in Error.  
vs  
CITY OF CHICAGO,  
Defendant in Error.)

ERROR TO

CIRCUIT COURT

COOK COUNTY.

197 I.A. 580

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff in error, hereinafter called the plaintiff, brought an action in assumpsit against the defendant in error, hereinafter called the defendant, for his salary as police patrolman, from the time of his discharge from the police force, August 20, 1903, until his reinstatement, January 13, 1912, amounting to \$9735.44, less the amount he had earned during said period -- \$5022.80, leaving a balance of \$4682.64, for which amount the action was brought. *\* It appeared that the facts are these:*

In 1895, the plaintiff passed the civil service examination and qualified as police patrolman of Chicago. He continued in such service until August 3, 1903, when charges were preferred against him, and <sup>until</sup> August 20th, <sup>where he</sup> an order was entered by the Civil Service Commission removing him from the police department. <sup>as the result of charges</sup> Afterwards, <sup>and</sup> June 19, 1908, he filed a petition in the Circuit Court of Cook County, praying that a writ of mandamus <sup>be</sup> issued to compel his reinstatement, <sup>for</sup> as patrolman. The case was tried, and on December 22, 1908, the court found

*granted* that the discharge of plaintiff was unlawful, and ~~ordered~~ that a writ of mandamus ~~be~~ issued concerning that plaintiff be immediately reinstated. <sup>March 9, 1909</sup> On March 9, 1909, ~~the writ of mandamus~~ was issued and served March 12, 1909. <sup>There was no</sup> Nothing appears from <sup>the record</sup> as to what further was done until the 23rd of December, 1911, when an alias writ of mandamus was issued and served on December 27, 1911. ~~His~~ Counsel for plaintiff explains the delay by stating that the defendant announced it





would sue out a writ of error ~~from the Appellate Court~~ to review the judgment, which could have been done any time within three years, and that immediately after said period of three years, ~~December 23, 1911~~, he obtained an alias writ of mandamus. Plaintiff was reinstated January 15, 1912, and on February 7, 1912, ~~this action was brought~~ <sup>this return</sup> ~~\*~~ The case was tried before the court without a jury. The court held that the plaintiff was entitled to recover the amount of his salary from the time of his discharge, August 30, 1903, until the order for his reinstatement December 23, 1908, amounting to \$6087.23, less the amount earned by the plaintiff from the time he was discharged in 1903 until he was reinstated in 1912, which was \$5022.80, leaving a net amount of \$1074.43, for which sum the court entered judgment. From this judgment both parties prayed and were allowed appeals, and the defendant has assigned cross-errors.

Plaintiff contends that the judgment entered in the mandamus proceedings is res adjudicata of the fact that he was a patrolman de jure during the period of time for which he seeks to recover his salary, and that therefore the court should have entered judgment in favor of the plaintiff for the full amount of such salary, \$2735.44, and without any deductions therefrom; that the court erred in refusing the plaintiff an opportunity to prove what part, if any, of the \$5022.80 he had earned prior to the date the writ of mandamus was awarded, December 23, 1908, and argues that as the court held plaintiff could not recover after said last mentioned date, the total amount which plaintiff had earned as above mentioned should not have been deducted, but only that part of it which was earned prior to said last mentioned date. The offer to make this proof was made after the court had



decided the case, which the court held was too late.

On the other hand the defendant contends that the judgment rendered in the mandamus proceedings is res adjudicata of the fact "first, that the office or position of police patrolman legally existed at the time plaintiff was discharged, and that he had a legal right thereto; and, second, that at the time the court entered the order of reinstatement the office or position existed legally, and that plaintiff was legally entitled to hold it. It was unnecessary for the court to determine whether or not the office or position existed any or all of the time from the date of the discharge to the date of entering the order of reinstatement and after the entry of the order of reinstatement. The office or position could have been abolished and created many times between the discharge and the order of reinstatement, and yet the court have properly entered an order reinstating the plaintiff, if it found that the office or position legally existed at the time of the discharge, and at the time of the entry of the order;" and, further, that in fact the defendant pleaded ordinances in force in Chicago which did not create the office or position.

A person seeking reinstatement as patrolman by a writ of mandamus must show the legal existence of the office or position, his clear right to the office, and the duty on the part of the respondents to perform the act sought to be enforced. Hickland v. City of Chicago, Gen. No. 20699, Appellate Court, First District; Leon v. Meyer, 214 Ill. 40; Gersch v. City of Chicago, 250 Ill. 551.

We are of the opinion that the contention of the defendant is untenable, and that the judgment in the mandamus proceedings conclusively established plaintiff's right to







the office, when the writ was ordered to issue. If anything had occurred during the period which would have terminated the right of the petitioner to the office, it could have been set up by a proper plea in the mandamus proceedings.

The plaintiff contends that he was entitled to the full amount of the salary from the time he was discharged until he was reinstated, without any deduction. This was not his position in the trial court. There he asked that the amount which he had earned in other employment during the time he was not acting as patrolman be deducted from the amount of his claim. He cannot shift his position in this court. At the close of all the evidence, June 15, 1914, the court took the case under advisement until June 17th, and on June 16th, counsel for plaintiff filed with the court a written brief and argument, which appears in the record, in which he sought to establish the right of the plaintiff to recover salary after December 22, 1908, by explaining the delay of plaintiff in obtaining reinstatement, so that it clearly appears that whether plaintiff was entitled to any sum after December 22, 1908, was one of the material questions in the case. On June 17th, after the court had announced its decision holding that the plaintiff was not entitled to recover after the last mentioned date, the plaintiff asked permission to reopen the case, for the purpose of showing what part of the \$5022.60 was earned before that date. It was within the sound discretion of the court to allow or deny this motion. In our opinion, considering all the facts of the case, the discretion of the court was not abused in refusing it.

In our opinion, the court properly held that the plaintiff was not entitled to recover for any salary after



December 30, 1903, since the writ of mandamus awarded on that date entitled the plaintiff to immediate reinstatement, and placed in his hands the whole power of the state to enforce immediate compliance with its terms. The reason why the plaintiff did not make an effort to seek reinstatement as stated by his counsel, sooner was/ because he feared that the City of Chicago would ~~xxxxxxxxxxxxxxxxxxxx~~ sue out a writ of error. In which event had, of course, it would have/ the benefit of the ruling of our Supreme Court in the case of Bullis v City of Chicago, 235 Ill. 474 (opinion filed June 18, 1903, six months before the judgment in the mandamus proceeding), wherein it was held that the office of police patrolman in the City of Chicago did not exist, of which ruling counsel for plaintiff must have been aware, as he was counsel in that case. By counsel's own statement, it appears that his delay in enforcing his right under the writ was voluntary, and he cannot therefore recover for salary during that period.

No written propositions of law, to be held as law, were submitted to the court by either the plaintiff or the defendant. Plaintiff, however, did submit written propositions of law the day after the case was tried, and the court properly refused them as not having been submitted in time.

Finding no substantial error in the record, the judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.





THE HOME INSTRUCTOR PUBLISHING  
COMPANY,

Defendant in Error.

vs.

BLUMENSTOCK BROS., a corporation,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 583

MR. PRESIDING JUSTICE MCBURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for an amount claimed to be due for advertising, and had judgment for \$228.95 which defendant seeks to have reversed. Plaintiff published a paper, called "The Home Instructor," <sup>and</sup> ~~it made a~~ contract <sup>with</sup> defendant to advertise the product of the American Cereal Coffee Company. The order for the advertisement calls for the insertion in the <sup>October</sup> ~~edition~~ for October, 1914, with details as to the space and position, of the advertisement, the price to be 68 cents a line, less commission. ~~There is no dispute as to the amount due, based upon the rate and the number of lines.~~ <sup>to be</sup> The advertisement ~~only~~ appeared in the October edition, and plaintiff claims that thereupon defendant was obligated to pay for the same.

A provision in the advertising order is as follows:

"This order is placed with the understanding that the cost per sale will not exceed the average cost of other mail order mediums used by this advertiser. That this and other copy not exceeding 387 lines will be repeated in the Dec. or any later issue if necessary without charge in order to produce orders at the average cost."

Defendant says this means that the amount which it was to pay for advertising was not to exceed for each sale resulting therefrom the average cost per sale resulting from similar





advertisements placed in other mail order mediums; that the average cost per sale was 50 cents, and that as the advertisement placed in plaintiff's publication resulted in but one sale, defendant was liable in the sum of 50 cents only.

We do not so construe this provision. We hold that the defendant was liable for the advertisement at the rate of 68 cents a line, less commission, when the advertisement appeared in the October edition of the Home Instructor. We construe this latter provision to be an undertaking by the publisher to continue the advertisement without further cost in subsequent issues until it had produced sales sufficient in number to make the advertising cost per sale no greater than the advertising cost per sale in other publications of a similar class; or, to put it more succinctly, to run the advertisement until the results, considering cost, were equal to results from other papers. † The advertisement had a coupon or form of order with a "key number" attached, which purchasers of the goods detached and forwarded to the ~~Cereal~~ Coffee Company. In this way account <sup>could</sup> be kept ~~of the number of sales resulting through the advertisement, in the particular publication.~~ It sufficiently appears from the evidence that plaintiff ~~did not refuse to carry out its obligation to continue the advertisement in its publication, and was ready and willing so to do,~~ but was ordered by defendant not to run it again after the October issue. † Under these circumstances plaintiff cannot be held to account for any failure to perform its full undertaking, and defendant is obligated for the amount it contracted to pay.

The judgment is right and is affirmed.

AFFIRMED.



172 - 21564

ABRAHAM STEIGER,  
Plaintiff in Error,

vs.

EDWARD F. KEEBLER,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 587

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Edward F. Keebler, defendant, is a real estate broker in Chicago, doing business as E. F. Keebler & Co. ~~He was instrumental in securing~~ a tenant for a store belonging to plaintiff. Plaintiff claims that before he closed the lease he told defendant or defendant's agent that another broker, named Staff, might or did claim a commission for procuring this same tenant, and that he did not wish to go on with the deal unless defendant would take care of Staff's claim, and that defendant said: "If you will have to pay

out the money to the other broker we will pay this money back"; and that thereupon the transaction was closed and Keebler was paid his commission. Subsequently Staff brought suit

against plaintiff, claiming commission, and had judgment against plaintiff for his commission. \*

Plaintiff in this suit now seeks to recover from defendant under the alleged promise by defendant to return the amount he received as commission in case plaintiff was compelled to pay Staff. Upon trial the court found the issues for the defendant.

The determination of this case depends solely upon the credibility of the witnesses. Plaintiff introduced testimony tending to support the promise claimed to have been made to him, while defendant denied categorically that he



ABRAHAM STEIN, Plaintiff in Error,

vs.

EDWARD F. WOOD, Defendant in Error.

1917 A. 587

REPLYING TO THE OPINION OF THE COURT.

ABRAHAM STEIN, Plaintiff in Error,

vs.

EDWARD F. WOOD, Defendant in Error.

1917 A. 587

REPLYING TO THE OPINION OF THE COURT.

ABRAHAM STEIN, Plaintiff in Error,

vs.

EDWARD F. WOOD, Defendant in Error.

1917 A. 587

REPLYING TO THE OPINION OF THE COURT.

ABRAHAM STEIN, Plaintiff in Error,

vs.

EDWARD F. WOOD, Defendant in Error.

1917 A. 587

REPLYING TO THE OPINION OF THE COURT.

ABRAHAM STEIN, Plaintiff in Error,

vs.

EDWARD F. WOOD, Defendant in Error.

1917 A. 587

REPLYING TO THE OPINION OF THE COURT.

ABRAHAM STEIN, Plaintiff in Error,

vs.

EDWARD F. WOOD, Defendant in Error.



~~ever~~ made <sup>any</sup> such ~~an~~ agreement. <sup>+</sup> We think the court was justified in concluding that Edward F. Keebler, in person, never made the promise upon which plaintiff seeks to recover.

① There was evidence tending to show that one Gilbert Keebler ~~an employee of defendant,~~ ~~had~~ made this promise to plaintiff. This was denied by Gilbert Keebler, <sup>②</sup> ~~who was an employee of the defendant.~~ <sup>③</sup> We do not find that Gilbert Keebler had any authority to make any such promise so as to bind the defendant.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

over such an agreement. +  
Justified in concluding that Edward T. Keefe, in person,  
never made the promise upon which plaintiff seeks to recover.  
There was evidence tending to show that one Albert Keefe  
in early 1934 made this promise to plaintiff. This was denied by  
Albert Keefe, who was an employee of the defendant. It  
is not found that Albert Keefe had any authority to make  
any such promise as to bind the defendant.  
There is no reason to disturb the judgment, and it  
is affirmed.

ATTORNEYS.

300 - 21696.

AUTOMATIC ELECTRIC COMPANY,	)	
Defendant in Error,	)	Error to
vs.	)	
	)	Municipal Court
ALBERT CAMPBELL,	)	
Plaintiff in Error.	)	of Chicago.

197 I.A. 591

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon a written guaranty of the defendant and had judgment for \$1,974.06, which defendant seeks to have reversed. Plaintiff's statement of claim alleges an indebtedness due it from the Auto Card Index Company for goods sold and delivered; that the Index Company although frequently requested failed to pay; that plaintiff threatened suit; that thereupon defendant requested plaintiff to forbear suit; that he was a large stockholder in the Index Company and suit would cause him personally heavy loss; that a deal was pending between himself, representing the Index Company, and other parties, looking to the investment of a large sum of money, and if plaintiff would forbear to bring suit for thirty days he, the defendant, would guarantee the payment of the amount due; that plaintiff agreed, provided defendant would enter into a written guaranty, and this was done, said guaranty being in words as follows:

"Whereas, at the date hereof the Auto Card Index Company, an Illinois Corporation, is indebted to the Automatic Electric Company in the sum of \$1,974.06; and  
Whereas, said Auto Card Index Company is unable at the present time to pay said account; and  
Whereas, Albert Campbell is heavily interested in said Auto Card Index Company as a stockholder; and

ATOMIC ELECTRIC COMPANY,  
Defendant in Error,

vs.

ALBERT E. BARNETT,  
Plaintiff in Error.

Filed to

Metropolitan Court

of Chicago.

1937 A. 591

MR. BARNETT'S MOTION FOR  
REVERSAL OF THE COURT'S

Plaintiff brought suit upon a written contract of

the defendant and had judgment for \$1,774.00, which

defendant seeks to have reversed. Plaintiff's statement

of claim alleges an indebtedness due to him from the Auto

Card Index Company for copies sold and delivered; that

the Index Company although frequently requested failed

to pay; that plaintiff borrowed suit; that defendant

defendant requested plaintiff to forebear suit; that he

was a large stockholder in the Index Company and suit

would cause him personally heavy loss; that a suit was

pending between himself, representing the Index Company,

and other parties, looking to the investment of a large

sum of money, and if plaintiff would forebear to bring

suit for thirty days he, the defendant, would guarantee

the payment of the amount due; that plaintiff agreed,

provided defendant would enter into a written guaranty,

and this was done, said guaranty being in words as follows:

"Whereas, at the date hereof, the Auto Card Index

Company, an Illinois corporation, is indebted to the

Automatic Electric Company in the sum of \$1,774.00; and

whereas, said Auto Card Index Company is unable to

pay the present time to any one account; and

whereas, Albert Barnett is heavily interested in

said Auto Card Index Company as a stockholder; and



Whereas, said Albert Campbell is willing to guarantee the payment of said account by said Auto Card Index Company;

Now, therefore, in consideration of forbearance on the part of Automatic Electric Company to urge the collection of said account from said Auto Card Index Company for a period of thirty days from and after the date hereof, Albert Campbell hereby guarantess the payment of said sum of \$1,974.06, on or before June 11, 1913; and further agrees to indemnify and save harmless Automatic Electric Company from any losses or damage it may sustain by reason of its forbearance as aforesaid.

In consideration of said guarantee by the said Albert Campbell, as aforesaid, the Automatic Electric Company agrees to forbear for thirty days from and after the date hereof, to urge the collection of the said account of \$1,974.06, now due and owing to it from Auto Card Index Company.

Witness the hands and seals of the parties hereto this 12th day of May, 1913.

Signed AUTOMATIC ELECTRIC COMPANY,  
By H. A. HARRIS, V. P.  
ALBERT CAMPBELL. (Seal)";

~~that during the said thirty days~~ Plaintiff forbore to sue <sup>as agreed</sup> upon the claim, <sup>and</sup> ~~and took no steps to urge the collection, of the same; that~~ Both the Index Company and the defendant wholly failed to pay said sum or any part thereof, and on June 12, 1913, plaintiff notified defendant of the default of the Index Company and demanded payment of the defendant, but defendant failed to pay.

The affidavit of defense alleged that ~~at the time defendant signed the contract set out in plaintiff's statement of claim~~ <sup>was signed</sup> there was no enforceable debt to forbear and ~~therefore there was~~ no good and valid consideration for defendant's promise <sup>to pay the debt.</sup>

The cause coming on for trial, plaintiff moved to strike the affidavit of defense from the files, and after argument it was so ordered. Defendant moved for leave to file an amended affidavit, which motion was denied, and a motion to amend the affidavit instanter was denied. Thereupon, as directed by the court, the jury returned a verdict



Index Company.  
of \$1,974.00, now due and owing to it from Auto Bank  
date hereof, to make the collection of the said account  
agrees to forebear for thirty days from and after the  
Campbell, as aforesaid, the Automatic Electric Company  
In consideration of said promise by the said Liberty  
may exist by reason of the forbearance as aforesaid.  
Automatic Electric Company from any losses or damage it  
1931; and further agrees to indemnify and save harmless  
amount of said sum of \$1,974.00, on or before June 11,  
date hereof, Albert Campbell hereby, witness the sig-  
Company for a period of thirty days from and after the  
the part of Automatic Electric Company to give the col-  
tion, therefore, in consideration of forbearance as  
Company;  
the payment of said account by said Auto Bank Index

Witness the hands and seals of the parties hereto  
this 18th day of May, 1913.

1. NAME \_\_\_\_\_  
2. ADDRESS \_\_\_\_\_  
3. CITY \_\_\_\_\_  
4. STATE \_\_\_\_\_  
5. ZIP \_\_\_\_\_

but defendant failed to pay.  
of the Index Company, and defendant failed to pay.  
January 12, 1912, plaintiff notified defendant of the delin-  
quency failed to pay, said sum or any part thereof, and on  
the same; that both the Index Company and the defendant  
upon the 12th and took no steps to have collection of  
the same.

There is no other evidence to support the claim that the defendant was in the area of the crime at the time it was committed. The defendant's alibi is not supported by any evidence.

Upon, as directed by the court, the jury returned a verdict of guilty. The affidavit of defense from the files, and after striking the affidavit of defense from the files, and after the same coming on for trial, Plaintiff moved to strike the affidavit of defense from the files, and after argument it was so ordered. Defendant moved for leave to file an amended affidavit, which motion was denied, and a motion to amend the affidavit granted or not denied. There-

for the plaintiff, and judgment was entered thereon.

It is first contended by defendant that it was an abuse of the court's discretion to refuse the defendant's motion for leave to amend the affidavit of defense or file an amended affidavit. We do not think so. In any event, there is nothing in the record before us to indicate how or in what manner defendant proposed to amend his affidavit of defense. The language of Mr. Justice Cartwright in Dilcher v. Schorik, 207 Ill. 528, is precisely in point:

"But if the petition could have been amended no amendment was presented, and the motion did not state in what respect appellant proposed to amend the petition. He does not even now suggest what amendment he desired to make or could have made, but says the amendment was presumably to meet some objection to the petition. A party is not entitled, as of right, to have leave to amend a pleading regardless of what the amendment is to be. A party who desires to file an amended pleading should prepare and submit it to the inspection of the court. There is no presumption that a proposed amendment will be a proper one, and it is not error to refuse to allow an amendment which is not presented and where there are no means of determining whether the amendment will be a proper and sufficient one or not."

The court did not err in holding that the affidavit stated no defense and ordering the same stricken from the files. It has been repeatedly held that a promise to forbear to sue, followed by an actual forbearance, is sufficient consideration to support a guaranty (McMicken v. Safford, 100 Ill. App. 102; Hamlin v. Piser, 163 Ill. App. 51), and that in a suit upon a guaranty the guarantor is estopped to deny the consideration of the guaranty or the validity of the original undertaking. Malleable Iron Range Co. v. Pusey, 244 Ill. 184. The rule is that where the contract of guaranty is made at the same time of making the original obligation, or where it is made before it, and the consideration of the original debt is the consideration upon which the guaranty is founded, in a suit upon the guaranty the

for the plaintiff, and judgment was entered against him.

It is then contended by defendant that the

action of the court in granting judgment against him

was not based on the merits of the case, but on the

fact that he was a non-resident of the State at the

time of the trial, and that the court had no

jurisdiction to try the case, and that the

judgment was void, and that the court should

revoke the same, and grant judgment in favor of

the plaintiff. The court, however, refused to

do so, and the plaintiff appeals from the

judgment of the court, and asks that the same

be reversed, and judgment be entered in favor of

the plaintiff. The court, however, refused to

do so, and the plaintiff appeals from the

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be reversed, and judgment be entered in favor of

the plaintiff. The court, however, refused to

do so, and the plaintiff appeals from the

consideration of the original debt may be inquired into, not because it is the consideration of the original debt, but because it is the consideration of the guaranty. In cases where the guaranty is founded upon a new and independent consideration, as in the case at bar, the sufficiency of the consideration of the original debt cannot be inquired into, it forming no part of the consideration of the guaranty.

The judgment is correct and is affirmed.

AFFIRMED.



consideration of the original text may be included also, not because it is the consideration of the original text, but because it is the consideration of the original text. In cases where the original is found upon a new and independent consideration, as in the case at bar, the sufficiency of the consideration of the original text cannot be insisted upon, it forming no part of the consideration of the original.

The argument is correct and is affirmed.

WILLIAM.



CITY OF CHICAGO,

Defendant in Error.

vs.

F. S. RICHARDSON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 594

MR. PRESIDING JUSTICE McSURNELY  
DELIVERED THE OPINION OF THE COURT.

Defendant, charged with keeping a disorderly house, was tried by the court and found guilty and fined \$200.

Defendant says the record contains no copy of the ordinance which he is charged with violating. If he desired to preserve for presentation to this court the question whether the court ~~xxxxx~~ from the evidence properly find him guilty of a violation of section 2019 of the Chicago Code, the section mentioned in the complaint, he should have incorporated that section into the stenographic report. Chicago v. Tearney, 187 Ill. App. 441; Chicago v. Moran, 192 Ill. App. 57; City v. Kohn, App. No. 20681, opinion filed December 6, 1915.

It is sufficient to say of the evidence that it justified the finding that the place was a disorderly house, as charged in the complaint.

The probative force of the evidence as to the character of the place was also sufficient to justify the conclusion of the court that defendant knew the kind of a place he was keeping.

The evidence sufficiently identified the premises with the premises named in the complaint.

There being no reversible error in the record, the judgment is affirmed.

AFFIRMED.

CITY OF CHICAGO,  
Defendant in error,

vs.

THE PEOPLE.

1937 A 704

W. J. RICHMOND,  
Plaintiff in error.

W. J. RICHMOND, Plaintiff in error,  
vs. THE PEOPLE, Defendant in error.

Defendant, charged with murder in the first degree,

was tried by the court and jury and was found guilty.

Defendant also has been convicted on two other counts.

Defendant also has been convicted on two other counts.

Defendant also has been convicted on two other counts.

Defendant also has been convicted on two other counts.

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Defendant also has been convicted on two other counts.

Defendant also has been convicted on two other counts.

ARTHUR FREUND,  
Defendant in Error,  
vs.  
MAX GOLDENBERG,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 596

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for money due on an oral contract whereby defendant agreed to hire plaintiff for the period from October 16, 1913, to January 15, 1914, at \$45 a week. After plaintiff had worked for a week and five days he was discharged, as he claims, without cause. Upon trial a jury assessed his damages at the sum of \$409.50 and judgment was entered, which defendant seeks to have reversed.

*Credul to show*  
~~From the evidence the jury could properly find~~  
that plaintiff was ~~an~~ experienced ~~man~~ <sup>the</sup> in ladies ready-to-wear clothing, and in October, 1913, was employed as ~~an~~ assistant manager <sup>business</sup> in a ladies' cloak and suit concern, ~~where~~ <sup>and</sup> ~~he was~~ making \$25 a week, with apparently every prospect of continued employment; ~~that~~ <sup>a</sup> at this time defendant and one Bruns purchased in the District Court of the United States at an auction sale a bankrupt stock of merchandise. Neither ~~defendant nor Bruns~~ had ever been in the ladies clothing business and they needed <sup>an experienced</sup> a man trained in this business to <sup>retail</sup> dispose of this stock, at retail. Defendant asked ~~plaintiff~~ to examine the stock, and also asked him whether he <sup>was</sup> ~~would~~ take charge of the sale of this merchandise, and plaintiff replied ~~that he had a steady position~~ <sup>that</sup> and it would not pay him to leave it for a short space of time. Several

ANTHONY J. ...  
Defendant in Error,  
vs.  
JAMES J. ...  
Plaintiff in Error.

197 I.A. 396

MR. PRESIDING JUDGE ...  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for money due on an oral contract whereby defendant agreed to hire plaintiff for the period from October 10, 1913, to January 10, 1914, at \$45 a week. After plaintiff had worked for a week and five days he was discharged, as he claimed, without cause. Upon trial a jury assessed his damages at the sum of \$403.50 and judgment was entered, which defendant seeks to have reversed. From the evidence in this case it appears that plaintiff was an experienced and efficient worker in the clothing line, and in October, 1913, was employed as a assistant manager in a ladies cloak and suit concern, where he was making \$25 a week, with opportunity over prospect of continued employment; that at this time defendant and one Burns purchased in the District Court of the United States at an auction sale a bankrupt stock of women's clothes. Defendant and Burns had ever seen in the ladies clothing business and had needed a man trained in this business to take care of this stock at retail. Defendant asked plaintiff to examine the stock, and also asked him whether he would take charge of the sale of this merchandise, and plaintiff replied that he had a ready knowledge of the business and would not pay him to leave it for a short space of time. Several



~~conversations followed which resulted in~~ <sup>an agreement</sup> that plaintiff should work for defendant from October 16th until the following January 15th at \$45 a week. Plaintiff entered upon his duties and did the things which are usually done under such circumstances to attract customers, ~~such as marking high prices on the garments, then crossing these out and marking them very low, thus displaying skill and experience in this line of business.~~ The suits and garments ~~in the stock were soaked and burned and of old style, and did not sell at the prices, that defendant and Bruns thought they should; they were not making a profit. It is evident that defendant became of the opinion that he was in a losing venture and could not afford to retain plaintiff, and after a week and five days~~ <sup>defendant discharged</sup> ~~he notified plaintiff that his services were no longer desired.~~ <sup>after</sup> ~~After this~~ plaintiff made efforts <sup>to</sup> to obtain other employment, and from October 28th until March 27th was able to secure a position for only three and a half weeks at \$12 per week. \*

It was claimed by defendant upon the trial, and argued in this court, that plaintiff made misrepresentations as to his ability, his salary and length of service with his former employer, that he did not perform his duties in a good and workmanlike manner and to the satisfaction of defendant, and that he was incompetent, and that his discharge was justified. None of these contentions impressed the jury as having merit.

There are no questions involved except questions of fact. We see no reason to disagree with the verdict, and the judgment is affirmed.

AFFIRMED.



conversations followed which resulted in an agreement that  
 Plaintiff should work for defendant from October 1941 until  
 the following January 15th at \$45 a week. Plaintiff entered  
 upon his duties and in the interim while the weekly work  
 under such circumstances to attract customers, such as wait-  
 ing with orders on the telephone, then crossing these out  
 and marking them very low, thus displaying skill and ex-  
 perience in this line of business. The work and business  
 in the store were taken and turned out of old style, and  
 did not call for any special skill or talent and some thought  
 they should; that was not what a plaintiff is. It is evident  
 that defendant's policy of the opinion that he was in a losing  
 position and could not afford to retain Plaintiff, and after  
 a week or two he decided Plaintiff was not the person  
 to whom he wanted to turn over the business. After this Plaintiff was allowed  
 to obtain other employment, and was discharged with a  
 letter which was only to secure a position for only three  
 or four weeks at his old work.  
 It was claimed by defendant that on the 15th, and  
 agreed in the contract, that Plaintiff was to be re-employed  
 as a full-time employee, his salary and length of service with his  
 former employer, that he did not perform his duties in a  
 good and workmanlike manner and to the satisfaction of de-  
 fendant, and that he was incompetent, and that his discharge  
 was justified. None of these contentions impressed the  
 jury as having merit.  
 There are no questions involved except ques-  
 tions of fact. We see no reason to disagree with the ver-  
 dict, and the judgment is affirmed.

L. BRENT VAUGHAN,  
Appellant,  
vs. Bill.  
ALICE R. VAUGHAN,  
Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

ALICE R. VAUGHAN,  
Appellee,  
vs. CROSS-BILL.  
L. BRENT VAUGHAN,  
Appellant.

197 I.A. 611

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

\* The parties to ~~this litigation~~ were married October 11, 1899, and lived together as husband and wife until October 1910, and thereafter continued to live in the same house until December 4, 1912. \* ~~They lived at 3230 Lake Park Avenue in a house owned by the husband subject to a mortgage of two thousand dollars. The semi-annual interest on the mortgage debt, amounting to sixty dollars, fell due about December 1, 1912, and Mr. Vaughan failing to pay it a bill to foreclose was filed and a receiver appointed, who demanded twenty dollars per month rent. Failing to pay the rent demanded, the receiver ordered Vaughan to leave the house and he did so and~~ rented two rooms with facilities for light housekeeping, and wanted his wife and their twelve year old daughter to occupy such rooms, ~~he but~~ did not himself ~~go to the rooms to live,~~ <sup>there</sup> but went to the Lexington Hotel and later to the University Club. He did not invite his wife and daughter to come to him at either place. ~~He was then out of employment but was the owner of twelve thousand dollars per value of the stock of the~~

THE STATE OF TEXAS,  
COUNTY OF DALLAS.  
I, the undersigned, a Notary Public in and for the State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original thereof, as the same appears from the records of my office.  
IN WITNESS WHEREOF, I have hereunto set my hand and the seal of my office, at Dallas, Texas, this 1st day of January, 1911.  
NOTARY PUBLIC.  
My Comm. Expires Jan. 1, 1912.

1911 A.D.

THE STATE OF TEXAS,  
COUNTY OF DALLAS.  
I, the undersigned, a Notary Public in and for the State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original thereof, as the same appears from the records of my office.  
IN WITNESS WHEREOF, I have hereunto set my hand and the seal of my office, at Dallas, Texas, this 1st day of January, 1911.  
NOTARY PUBLIC.  
My Comm. Expires Jan. 1, 1912.

Bryant & Stratton Business College, which he sold a year or longer afterwards for two thousand dollars. December 3, 1912, he filed a bill in the Circuit Court for divorce on the ground of desertion, alleging that he had treated his wife as a faithful and dutiful husband, and that she without cause deserted him October 1, 1910. The defendant answered the bill January 4, 1913, denying its allegations and the same day filed her cross-bill alleging that she had lived separate and apart from her husband since December 4, 1912, without any fault on her part, and praying that the defendant be required to make reasonable provision for the support of herself and daughter. The defendant answered the cross-bill January 27, 1913, denying its material allegations.

The cause was heard February 10, 1915, and the complainant in the original bill, before any evidence was introduced, moved for leave to dismiss his bill without prejudice, and the Court by its final decree entered March 12, 1915, denied the motion and adjudged and decreed that the bill be dismissed for want of equity. The Court by the decree found that the defendant to the cross-bill had since December 1912 been guilty of continuous and wilful desertion of the complainant therein; that he had an income of four thousand dollars per year, and that complainant was entitled to separate maintenance, and it was adjudged and decreed that the defendant to the cross-bill pay to complainant therein for the support of herself and daughter seventy-five dollars per month and one hundred seventy-five dollars for her solicitor's fees; and from that decree the defendant to the cross-bill prosecutes this appeal.

The provision of the statute that, "no complain-







ant shall be allowed to dismiss his bill after a cross-bill has been filed without the consent of the defendant," is conclusive against the contention of appellant that the Court erred in denying his motion to dismiss his bill without prejudice.

The trial Court did not err in its rulings on questions of evidence.

The evidence was preserved by a certificate of evidence, and the question presented is whether the evidence supports the decree, and no findings of fact are required to support the decree.

We think that from the evidence the Court might properly find that Mrs. Vaughan was living separate and apart from her husband without her fault and was therefore entitled to a decree for separate support and maintenance and solicitor's fees, and the decree appealed from is affirmed.

AFFIRMED.

and shall be allowed to discuss his bill after a three-day  
 has been filed without the consent of the respondent, it  
 conclusive against the respondent to admit that the  
 Court cited in reply his motion to dismiss his bill with-  
 out prejudice.

The trial court did not say in its ruling on  
 the motion to dismiss.

The evidence was presented as a certificate of  
 evidence, and the question presented is whether the evidence  
 supports the decree, and on finding of fact and evidence  
 is sufficient to sustain the decree.

It is held that the evidence is not sufficient  
 to support the decree. The evidence is not sufficient to  
 show that the respondent was living separate and apart  
 from her husband at the time the decree was entered. The  
 evidence is not sufficient to show that the respondent was  
 living separate and apart from her husband at the time the  
 decree was entered. The evidence is not sufficient to show  
 that the respondent was living separate and apart from her  
 husband at the time the decree was entered.

REVEREND,

HARRY W. KUETEMEYER, Administrator  
of the Estate of Louis J. Iverson,  
deceased,

Appellee,

vs.

ILLINOIS CENTRAL RAILROAD CO., et  
al., Appeal of MICHIGAN CENTRAL  
RAILROAD COMPANY,

Appellant.

APPEAL SUPERIOR COURT,  
COOK COUNTY.

197 I.A. 616

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries in which plaintiff had judgment for \$1,000 in the Superior Court on the verdict of a jury against the defendant appellant, and it appeals to this Court for a reversal with a finding of fact in its favor. Plaintiff having died since the entry of judgment, this appeal is defended by the administrator of his estate.

*fore* Plaintiff ~~was~~ at the time of the accident counted upon in his declaration, and had been for a *long time* quarter of a century prior thereto, *and for some time* a painter. At the time of the accident and for some time preceding that date he worked for one Ettinger, a contract painter for the Illinois Central Railroad Company, and did painting at various places along the road of the Illinois Central Company. He had been acting for about ten days prior to the accident as foreman of painters on the painting job at which he was working when hurt.

Plaintiff had been a sailor and was experienced in splicing ropes and erecting scaffolds. On the day of the accident plaintiff was foreman *acting as* over a gang of painters and was engaged in splicing ropes and, with the other painters under him, in constructing a scaffold to be used in painting

HARRY W. HARTMAN, Administrator  
of the Estate of Louis J. Iversen,  
deceased,

Appellee,

vs.

ILLINOIS CENTRAL RAILROAD CO., et  
al., Appellants,  
RAILROAD COMPANY.

Appellant.

APPEAL FROM THE CIRCUIT COURT  
OF COOK COUNTY.

1917 A.D.

MR. JUSTICE HOLCOM DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries in

which plaintiff had judgment for \$1,000 in the Superior

Court on the verdict of a jury against the defendant

appellant, and its appeal to this Court for reversal with

a finding of fact in its favor. Plaintiff having filed

since the entry of judgment, its appeal is defended by

the administrator of his estate.

Plaintiff was at the time of the accident

employed as a painter, and had been for a

number of years prior thereto, a painter. At the

time of the accident and for some time preceding same

he was employed for one thing, a contract painter for

the Illinois Central Railroad Company, and the painting

at various places along the road of the Illinois Central

Company. He had been acting for about ten days prior to

the accident as foreman of painters on the painting job at

which he was working when hurt.

Plaintiff had been a sailor and was experienced

in climbing ropes and erecting scaffolds. On the day of the

accident plaintiff was foreman over a crew of painters and

was engaged in climbing ropes and with the other painters

was engaged in constructing a scaffold to be used in painting



the train shed of the Illinois Central Company at a place designated as being immediately above the stone wall separating the St. Charles Air Line from the station tracks. Two or three feet east of this stone wall were two parallel tracks running north and south, known as the St. Charles Air Line, east of which was a switch yard with thirty or forty tracks. The southbound track of the St. Charles Air Line was within three feet of this stone wall. Along these tracks were run engines of the Pennsylvania, North Western, Burlington, Illinois Central, Michigan Central, and other railroads.

The place where Iverson was working at the time ~~he was hurt~~ was about three feet higher than the level of the ground. It was a very busy spot. Both freight and passenger trains <sup>low crossed by crossing</sup> ran along the St. Charles Air Line tracks. ~~Trains were constantly moving along the tracks.~~ There was nothing ~~in the way~~ at the time of the accident to obstruct the view of Iverson and the other painters of the movement of trains north and south. Engines came along these tracks both with and without cars, attached. The scaffold upon which Iverson was working had been laid upon the wall under his direction. Iverson was struck by an engine running along the south-bound track ~~in a southerly direction~~, causing him to fall from the wall to the ground, a distance of about three feet. Iverson swore that he was struck by the steps of the engine, which hung over the track about two feet. Iverson also testified that the engine ~~that struck him~~ was marked "M. C. 8172."

<sup>It was undisputed</sup> That Iverson was and for several years had been well informed of the operation of engines and cars along the track near which he was working, ~~is not in dispute.~~ He was



the train shed of the Illinois Central Company at a place designated as being immediately above the stone wall separating the St. Charles Air line from the station tracks. Two or three feet east of this stone wall were two parallel tracks running north and south, known as the St. Charles Air line, east of which was a switch yard with thirty or forty tracks. The southbound track of the St. Charles Air line was within three feet of this stone wall. Along these tracks were run engines of the Pennsylvania, Erie, Western, Burlington, Illinois Central, Michigan Central, and other railroads.

The place where Iverson was working at the time he was hurt was about three feet higher than the level of the ground. It was a very busy spot. Both freight and passenger trains, along the St. Charles Air line tracks. Trains were constantly moving along the tracks. There was nothing in the way at the time of the accident to obstruct the view of Iverson and the other painters of the movement of trains north and south. Engines came along these tracks both with and without cars attached. The accident upon which Iverson was working had been laid upon the wall under his position. Iverson was struck by an engine running along the south-bound track in a southerly direction, causing him to fall from the wall to the ground, a distance of about three feet. Iverson swore that he was struck by the steps of the engine, which hung over the track about two feet. Iverson also testified that the engine that struck him was running

"M. C. 512."

That Iverson was and for several years had been well informed of the operation of engines and cars along the track near which he was working, is not in dispute. He was

~~also fully cognizant of the dangers environing him at his work.~~

⑥ At the close of plaintiff's <sup>instructed</sup> ~~proofs~~ both defendants moved for an instructed verdict, ~~in their favor~~, which the court allowed as to the Illinois Central Railroad Company but denied as to the Michigan Central Railroad Company. The defendant <sup>Michigan Central Railroad Company</sup> ~~appellant~~ here again moved, at the close of all the <sup>instructed</sup> ~~proofs~~, for an instructed verdict ~~in its favor~~, which was again denied. ⑦ Error is assigned and argued on the refusal of the Court to instruct a verdict in favor of defendant, the Michigan Central Railroad Company, and it is also assigned for error that Iverson was guilty of contributory negligence, and it is contended that defendant appellant was not guilty of the negligence charged against it.

We are satisfied from the evidence in the record that Iverson was not at the time he was injured in the exercise of due care for his own safety. Knowing the dangers of the situation in which he found himself, he paid no attention to the approach of the engine which struck him. If he had looked he could have seen the engine in time to have avoided being struck by it; and there is no evidence in the record which excuses or absolves him from the duty he owed himself to look and watch for the operation of the rolling stock which he knew was constantly moving along the track in close proximity to which he was working.

No count in the declaration charges wanton or wilful negligence on the part of appellant defendant, nor is there any evidence showing that any one upon the engine which it is claimed injured Iverson knew of the presence of Iverson in time to have avoided the accident in the exercise of ordinary care. We think the facts of this case are within the

[illegible]

ruling of Belt Ry. Co. v. Ghszypczak, 225 Ill. 242, where the Court say:

"The general rule is, that negligence and contributory negligence are questions of fact, but when there is no dispute as to the facts, or when only the evidence most favorable to the plaintiff, with the inferences reasonably to be drawn therefrom, is considered, and when all reasonable minds will agree, upon consideration of the facts, that the plaintiff's own negligence contributed to the injury, the question of contributory negligence becomes one of law, and the refusal to give a peremptory instruction for the defendant is then reversible error. Beidler v. Branshaw, 200 Ill. 425; Wilson v. Illinois Central Railroad Co., 210 Id. 603; Hewes v. Chicago and Eastern Illinois Railroad Co., 217 Id. 500."

We think it appears from Iverson's testimony that the engine which struck him was in plain sight as it approached from the north, and that his injury was caused by his failure to look for the approach of south-bound engines or cars. In this condition of the record, the question as to whether Iverson was in the exercise of due care for his own safety at the time of his injury, became one of law for the court, and the peremptory instruction asked should have been given.

The evidence does not show in that conclusive way which the law requires that the engine which struck Iverson was the property of defendant appellant. Iverson was positive that this engine was marked "M. C." and numbered "8172," while it is conclusively proven that the engine of defendant appellant marked with this number was not near Chicago at the time of the accident but, as a matter of fact, was being operated between Windsor, Canada, on the east side of the Detroit River, and Buffalo, in the State of New York, on the Canada Southern Division of defendant appellant's road; and, furthermore, that that engine had never been operated between Michigan City and Chicago.

We think that on this issue defendant succeeds



... (V) ...



under its plea denying ownership, operation and control of the engine which struck Iverson.

There are other errors in this record, but the foregoing being fatal to the right of recovery, the judgment of the Superior Court is reversed with a finding of facts.

REVERSED.

(Over.)

under its press driving operation, operation was carried out and  
 engine which started to run.  
 There are other errors in this report, but the  
 foregoing being taken to the effect of recovery, the present  
 of the accident report is reviewed with a view to the  
 following.

(over)

564 - 20899

## FINDING OF FACTS.

The Court finds as matters of fact that defendant was not guilty of the negligence charged against it in Iverson's declaration, and that at the time Iverson suffered the injuries complained about he was not in the exercise of due care for his own safety, but was guilty of negligence which was the proximate cause of the accident and the attendant injuries.



129 - 21520

HENRY MEINSHAUSEN, doing  
business as German American  
Oil Co.,

Defendant in Error,

vs.

AMERICAN SHIPPING COMPANY,  
a corporation,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 620

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment, on a finding by the trial Judge, against defendant, for \$544.46, which defendant asks this Court to reverse.

From the evidence in this record we conclude that the trial Judge might well find that defendant was indebted in the transactions involved in this suit in the amount for which plaintiff had judgment. This leaves for our determination whether defendant's contract was with plaintiff as principal or as agent for Botho Farenholtz of Magdeberg, Germany, there doing business in the name of G. W. Farenholtz. To solve this problem recourse must be had to the agreement between the parties as established by the evidence found in the record.

\* Plaintiff was the resident agent ~~in this country~~ of Botho Farenholz of Magdeberg, Germany, a manufacturer of oils. Defendant was a custom house broker, having places of business in New York and Chicago. Plaintiff ~~was the agent of Farenholtz~~ and had charge, as such agent, of consignments of ~~peanut and other~~ oils shipped by Farenholtz to this country, ~~to purchasers resident here~~. Defendant, at the instance of plaintiff, did the brokerage business connected with the oils consigned by Farenholtz and shipped to Atlantic



UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C.  
JANUARY 11, 1950  
MEMORANDUM FOR THE DIRECTOR  
SUBJECT: [REDACTED]

TO: [REDACTED]

155 - 11350

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

13. [REDACTED]

14. [REDACTED]

15. [REDACTED]

16. [REDACTED]

17. [REDACTED]

18. [REDACTED]

19. [REDACTED]

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

ports. Plaintiff was paid a commission by Farenholtz on the sale of all such oils. Among ~~many duties devolving on plaintiff~~ <sup>duties</sup> as the agent ~~and representative~~ of Farenholtz was the placing of sea and leakage insurance upon the oil shipped by Farenholtz, ~~to Atlantic ports in this country.~~ Plaintiff ~~made~~ <sup>an arrangement</sup> with defendant to place ~~such sea and leakage~~ insurance. \*

We are not concerned with the varied ramifications of the business transacted by plaintiff as agent for Farenholtz or the connection of defendant therewith, except as the same may have a bearing upon the matters in controversy in this suit, being the overcharge by defendant for premiums on certain marine insurance placed by defendant, on the instructions of plaintiff, upon shipments made by Farenholtz of oils from Germany to Atlantic ports in this country. The crucial question is: Was the contract with defendant made by plaintiff as principal or as agent for Farenholtz? A careful scrutiny of all the evidence in the record on this question we think overwhelmingly establishes the fact that the contract in relation to such marine insurance was with plaintiff. The insurance was not placed by defendant at the direction of Farenholtz personally, although it covered his property. Plaintiff was under no contractual obligation to employ defendant to place the insurance; he could have placed it wheresoever he saw fit, so far as any instructions from his principal were concerned.

+ Defendant was in no way obligated to Farenholtz, <sup>its</sup> ~~Defendant's~~ dealings <sup>fully</sup> were wholly with plaintiff. To him defendant rendered bills for ~~premiums~~ and plaintiff paid them, ~~to~~ <sup>to</sup> defendant. ~~That~~ Farenholtz subsequently reimbursed plaintiff <sup>+</sup> is ~~beside the question.~~ The contract under which the insur-

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ance was placed was between plaintiff and defendant. All the moneys which defendant received, both for services as custom house broker and for insurance premiums, were paid to it by plaintiff. There being no contractual relationship between Farenholtz and defendant, payment to the plaintiff of the amounts here involved, whether voluntary or otherwise, would be a complete satisfaction of the indebtedness.

The fact that Farenholtz may have instructed plaintiff as his agent to cancel certain insurance in no way operated to change the fact that the contract in the first instance was made between plaintiff and defendant. Farenholtz was operating in this country through plaintiff and had no independent place of business here, and contracts such as the one in the case at bar, made by plaintiff, are enforceable at his instance.

The title to the oils insured is not involved in this action. The right to demand and sue for the overcharge on premiums is the subject-matter of this suit. The premiums were originally paid by plaintiff to defendant under an arrangement between them, and as defendant was paid by plaintiff more than its due, plaintiff had the right to demand and receive the excess so paid. If plaintiff paid defendant more than he should for insurance, this would not give him any right to charge the excess payment to Farenholtz. We think the rule laid down by Lord Mansfield in Stevenson v. Mortimer, 2 Cowp. 806, is not only applicable to the facts in this record, but decisive of the rights of the parties. Lord Mansfield said: "Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover



It is my sincerest hope that you will find this information helpful and that you will be able to use it in your work. I am sure that you will find it very interesting and that it will be of great value to you. I am sure that you will find it very interesting and that it will be of great value to you. I am sure that you will find it very interesting and that it will be of great value to you.

... ..

The fact that the Government has never been able to establish a firm policy in regard to the treatment of the Chinese in the Philippines is a serious matter. It is a matter which has caused much trouble and has been a source of much dissatisfaction to the Chinese people. It is a matter which has caused much trouble and has been a source of much dissatisfaction to the Chinese people. It is a matter which has caused much trouble and has been a source of much dissatisfaction to the Chinese people.

Two days after the attack on Pearl Harbor, the Japanese government announced its intention to withdraw from China and Manchuria. This move was seen as a sign of weakness by the United States and Britain, who were already at war with Japan.

THE PRINCIPLES WERE ORIGINALLY PUT IN PRACTICE IN ALEXANDRIA UNDER AN EGYPTIAN GOVERNMENT, AND AN EGYPTIAN WAS PAID BY MONTHLY WAGE FOR THE WORK. THE PRINCIPLES WERE ORIGINALLY PUT IN PRACTICE IN ALEXANDRIA UNDER AN EGYPTIAN GOVERNMENT, AND AN EGYPTIAN WAS PAID BY MONTHLY WAGE FOR THE WORK.

in Stevenson v. Whitely, 7 Conn. 285, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 25



it back."

There is no reversible error in this record, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

12.000.

There is no reliable record in this record, and  
the amount of the original cash is therefore stated.  
12.000.

H. M. JOHNSON, Receiver,  
Defendant in Error,

vs.

THOMAS HENNESSEY and MRS. H. M.  
DETTMAR,  
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 622

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

Defendants seek this review and ask a reversal of a judgment against them entered by confession under power so to do contained in a written lease of certain premises in Chicago from plaintiff to defendants.

\* Defendants moved on the affidavit of defendant Hennessey to open the judgment and to be let in to defend the action. The affidavit sets forth that the defendant Dettmar was in physical possession of the premises leased; <sup>11/11/16</sup> that she was ~~charged with~~ <sup>maintained on a 1-6</sup> maintaining a disorderly house, ~~which was on such charge "raided" by the police;~~ that plaintiff told Hennessey that tenants in the building in ~~which the leased premises were,~~ complained to him about the disorderly establishment that Mrs. Dettmar was conducting and ~~said that she could have to move, and that she accordingly~~ <sup>quit</sup> moved; that he, Hennessey, never had any physical possession <sup>crushed her to</sup> of the premises and ~~that he signed the lease as guarantor only.~~ \*

These facts, if facts they were, constituted no defense to the claim for rent and furnished no reason authorizing the court to open the judgment and let defendants present their unavailing defense.

The rights of the parties must be admeasured by their contract, which is the written lease found in the record. By it both defendants are lessees of plaintiff and equally liable to perform all the covenants of the lease

U. S. DEPARTMENT OF JUSTICE  
DIVISION OF INVESTIGATION  
WASHINGTON, D. C.  
JANUARY 10, 1934  
TO THE ATTORNEY GENERAL  
FROM THE DIRECTOR

1917 I.A. 622

RE: JAMES EARL RAY, ALLEGEDLY THE AUTHOR OF THE BOOK

THE AMERICAN WAY, AND HIS ALLEGED CONNECTION WITH THE

RECENTLY DISCOVERED BOMBING OF THE LINCOLN MONUMENT IN  
WASHINGTON, D. C. ON JANUARY 30, 1933.

It is requested that you cause to be made a search of the  
files of the Department of Justice for any information  
which may be available in connection with the above  
mentioned case.

Very respectfully,  
J. Edgar Hoover, Director

Enclosed for the Attorney General are two copies of a  
letterhead memorandum from the Division of Investigation  
dated and captioned as above.

Very truly yours,  
J. Edgar Hoover, Director

binding upon them. While, as between defendants, Hennessey may be a guarantor, and Dettmar, as between them, liable to recompense Hennessey for rent which he may be compelled to pay, yet as between the parties to the lease both defendants are liable to pay rent to plaintiff according to the contract so to do found in the lease. Hennessey was also liable to plaintiff for allowing his co-tenant to conduct a disorderly house, and when the fact that such a disorderly house was being maintained was discovered, Hennessey's duty was to suppress it; but the removal of Dettmar from the premises, even by request, for the cause assigned, in no way relieved Hennessey from his liability to pay the rent provided by the terms of the lease. The removal of Dettmar and her disorderly associates from the leased premises did not operate to bring to an end the relation of landlord and tenant. The authorities cited by defendants have no application to the facts of this case.

Where a written instrument is not ambiguous there can be no resort to parol proof to construe its terms. Gibbs v. Peoples Nat. Bank, 195 Ill. 307. The liability of Hennessey is that of a lessee with his co-tenant Dettmar, and as Hennessey's affidavit disclosed neither a legal nor a meritorious defense, the trial Judge properly denied defendants' motion to open the judgment, etc.

The judgment of the Municipal Court is not erroneous and it is therefore affirmed.

**AFFIRMED.**



binding upon them. While, as between defendant and plaintiff, the latter is bound to pay, yet as between the parties to the lease, defendant is not liable to pay rent to plaintiff according to the contract as so found in the lease. Defendant was also liable to plaintiff for allowing his co-tenant to commit a disturbance, and when the fact that a disturbance was being maintained was discovered, defendant's duty was to suppress it; but the removal of defendant from the premises, even by redress, for the cause assigned, in no way relieved defendant from his obligation to pay the rent provided in the terms of the lease. The removal of defendant and her associates from the leased premises did not operate to bring to an end the relation of landlord and tenant. The removal of defendant by defendant's own action has no effect upon the relation of this case.

Where a written instrument is not produced, there can be no resort to oral proof to establish its contents. Gibbs v. Peoples Ice Bank, 195 Ill. 507. The finding of defendant is that of a lease with its co-tenant defendant, and as defendant's affidavit discloses no other legal basis for her retention of the premises, the trial judge properly denied defendant's motion to open the judgment, etc.

The judgment of the appellate court is not erroneous and it is therefore affirmed.

APPROVED.

ALFRED D. KOENIG, a minor,  
by DAVID KOENIG, his next  
friend,

Defendant in Error,

vs.

FRANK SEMRAU,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 624

MR. JUSTICE HOLBOM DELIVERED THE OPINION OF THE COURT.

Alfred D. Koenig, a minor, by his next friend, David Koenig, recovered a judgment upon the verdict of a jury for \$400 in an action for personal injuries, and defendant by this writ of error asks a reversal of the judgment.

~~The plaintiff and John Semrau, a son of defendant, both minors, were the actors in the accident involved in this suit. John Semrau was driving his father's large seven passenger Mitchell touring car, and Alfred D. Koenig was riding and driving his two cylinder motorcycle.~~  
*a minor and son of defendant,*

~~But one contention is raised and argued by defendant, and that is that the verdict and judgment are contrary to the probative force of the proof. If this contention were well taken it would be our duty to reverse the judgment. A careful examination, however, of all the testimony convinces us that John Semrau was guilty of the negligence charged, which negligence was the primal cause of the accident, and that Alfred D. Koenig was at the time of the accident in the exercise of due care for his own safety and was driving his motorcycle at a moderate rate of speed when the collision occurred.~~

~~The preponderance of the evidence establishes-~~

ALFRED D. TOWNE, a member,  
OF DAVID GREEN, his agent,  
(Signed,

Witnessed in 1914,

vs.

FRANK GREEN, his agent,  
Witnessed in 1914.

1914 A. 624

THE FOLLOWING POLICE OFFICERS THE OFFICERS OF THE COURT.

ALFRED D. TOWNE, a member, in 1914, by his next friend,  
DAVID GREEN, brought a judgment upon the verdict of a  
jury for \$200 in an action for personal injuries, and the  
return of this writ of error made a reversal of the judgment.

THE JUDICIAL AND LEGAL OFFICERS, a part of the  
and, both of them, were the officers of the judicial system  
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*He appeared* *who was driving north*  
~~the fact~~ that John Semrau, suddenly and without giving any  
 warning turned his father's <sup>car</sup> car, which he was driving north,  
 around so that he might drive it southward, when Alfred D.  
 Koenig, who was riding south on his motorcycle at a reasonable  
 speed, and, while in the exercise of due care to avoid the  
 impact, collided with defendant's car, injuring both himself  
 and his motorcycle. While it is true that both the sons of  
 defendant who were in the car swore that they looked before  
 John turned, *(critical scene)* the car and that neither of them saw any vehicle  
 in sight, yet in view of the indisputable facts that Alfred D.  
 Koenig was riding his motorcycle south, within clear view of  
 the occupants of the car, and that the turning of the car  
 obstructed his progress, such evidence is nothing worth. It  
~~has~~ admitted that the street was clear of vehicles and that  
 there were no obstacles to obstruct the vision of those in  
 the car. \* In this situation it was negligence not to have  
 seen that which was clearly visible.

Alfred D. Koenig, through no fault of his own  
 but solely through the negligent driving of the car of de-  
 fendant by his son John, suffered a fracture of his right  
 arm in two places and his motorcycle was so much damaged that  
 it cost \$99.50 to repair it. The damages awarded are reason-  
 able for the injuries inflicted to person and property.

There are no errors in procedure and the verdict  
 being supported by a preponderance of the evidence, the judg-  
 ment of the Municipal Court is affirmed.

The additional abstract filed by plaintiff was  
 necessary through the neglect of defendant to sufficiently  
 abstract the record, and the cost thereof will be taxed as a  
 part of the costs of the cause.

AFFIRMED.







98 - 21072

THE PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in Error.

vs.

HARRY DAVIS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 I.A. 629

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Harry Davis, defendant, was tried in the Municipal Court of Chicago before a jury upon <sup>7th</sup> ~~an~~ information, as amended, charged <sup>defendant</sup> that on October 4, 1914, ~~he~~ "did then and there attempt to commit an offense prohibited by law, to-wit, the offense of petit larceny, and did then and there do a certain act toward the commission of same, to-wit, put his hand into the trouser's pocket of the complainant where complainant held same, and then and there failed and was prevented from committing the offense of petit larceny, contrary to the form of the statute," etc. When the case was called for trial the defendant was <sup>S</sup> ~~asked~~ whether he pleaded guilty or not guilty to the charge, and he replied "I refuse to be arraigned." Subsequently a jury was called and sworn, and evidence was introduced, and a verdict was returned finding the defendant "guilty in manner and form as charged in the information," upon which verdict the court, after overruling defendant's motions for a new trial and in arrest of judgment, adjudged that he be confined in the house of correction for the term of six months.

The point is made by counsel for defendant that the record does not disclose that when the defendant stated that he refused to be arraigned the court ordered that a plea of not guilty be entered as provided by the statute, or that at

STATE OF ILLINOIS  
JUDICIAL DEPARTMENT  
OF CHICAGO

THE PEOPLE OF THE STATE  
OF ILLINOIS,  
Defendant in Error,

vs.

HARRY DAVIS,  
Plaintiff in Error.

1917 I.A. 62

MR. PRESIDING JUDGE GRANT LIVINGSTON, JR. OF THE COURT

HARRY DAVIS, defendant, was tried in the Municipal Court of Chicago before a jury upon information, as amended, charging that on October 4, 1914, he "did then and there attempt to commit an offense prohibited by law, to-wit, the offense of petit larceny, and did then and there so a certain act toward the commission of same, to-wit, put his hand into the trousers pocket of the complainant where complainant held money, and there lifted and was prevented from committing the offense of petit larceny, contrary to the form of the statute, etc. When the case was called for trial the defendant was asked what he pleaded guilty or not guilty to the charge, and he replied "I refuse to be arraigned." Subsequently a jury was called and sworn, and evidence was introduced, and a verdict was returned finding the defendant "guilty in manner and form as charged in the information," upon which verdict the court, after overruling defendant's motion for a new trial and in arrest of judgment, adjudged that he be confined in the House of Correction for the term of six months.

The point is made by counsel for defendant that the record does not disclose that when the defendant asked that he refused to be arraigned the court ordered that a plea of not guilty be entered as provided by the statute, or that at

any time any plea was entered by or for the defendant, and that in the absence of a plea the judgment is erroneous.

Upon examination we find that the record was one prepared by the Clerk of the Municipal Court as per praecipe, in which praecipe the clerk was directed to certify to this court a record to include only the information, the verdict of the jury, the judgment of the court, and the bill of exceptions. It appears from the certificate of the clerk that he certified "the above and foregoing to be a true, perfect and complete transcript of the record as per praecipe incorporated herein." In the second paragraph of section 81 of the Practice Act as amended, provision is made for the certifying to an appellate court of certain parts of the record of a case as per praecipe, but this practice is limited as stated in said section to "any cause of a civil nature." This is a criminal case. In the absence of a complete record, we do not think that we can presume that when the defendant voiced his refusal to be arraigned the court did not order a plea of "not guilty" to be entered on behalf of the defendant, or that such a plea was not in fact entered of record. On the contrary we think that where the record is on its face fragmentary and incomplete the judgment of the Municipal Court is to be supported by every reasonable intendment and presumption. (Culver v. Schroth, 153 Ill. 437, 443; Tolman v. Dreyer, 50 Ill. App. 243, 244; Bartlett v. Woodbine Savings Bank, 57 Ill. App. 423, 424; Springer v. Maddock, 59 Ill. App. 40, 41; Bertrand v. Taylor, 87 Ill. 235.) And the fact that the bill of exceptions in this case does not affirmatively show that a plea of not guilty was entered by or for the defendant makes no difference. The bill of exceptions is not the proper place for the plea. The plea is a part of the common law record. "The use of a bill of





exceptions is not to embrace in it matters of record, but to make that a part of the record which otherwise would not be such." (Cilley v. Hawkins, 48 Ill. 308, 311.)

We have considered the other points raised and do not find any reversible error in the record, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.



exceptions in not to refuse in its relation to conduct, but to  
make that a part of the record which will be taken into account  
such. (Hill v. Hill, 40 Ill. 200, 1871.)  
We have considered the other points raised and  
do not find any reversible error in the record, and the  
judgment of the appellate court is affirmed.  
Affirmed.

153 - 21129

PHILOMINA V. SHANKLIN,  
Plaintiff in Error,

vs.

WILLIAM KAMIN,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 630

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff seeks to reverse a judgment rendered against her for costs by the Municipal Court of Chicago and have this appellate court enter a judgment in her favor in the sum of \$300. The claim is for money deposited as security with the defendant under the terms of a written lease, dated June 10, 1910.

\* The defendant leased to plaintiff the store and basement of premises known as 1391 Milwaukee Avenue, to be occupied as a "5-cent" theatre, from July 1, 1910, until April 30, 1913. ~~In the first clause of the lease~~ plaintiff agreed ~~to pay as rent for said demised premises the sum of \$5,100, payable in monthly installments of \$150, except the last three months of this lease which said sum of \$450 had been paid by the lessee as security, under this lease.~~ "In the seventh clause <sup>that</sup> it is provided, <sup>that</sup> If said party of the second part (plaintiff) shall abandon or vacate said premises, they ~~same~~ shall be re-let by the party of the first part (defendant) for such rent and upon such terms as said party <sup>may</sup> see fit; and if a sufficient sum shall not be thus realized, after paying the expenses of such re-letting and collecting, to satisfy the rent hereby reserved, the party of the second part (plaintiff) agreed to satisfy and pay all deficiency."

WILSONIA V. KAMIN, Plaintiff in Error,

vs.

VILIAM KAMIN, Defendant in Error.

WITNESSES TO

WILLIAM COURT

OF CHICAGO.

1917.11.680

MR. WILSONIA VILIAM COURT, THE DEFENDANT OF THE COURT.

The plaintiff seeks to recover a judgment rendered against her for costs by the Municipal Court of Chicago and have this appellate court enter a judgment in her favor in the sum of \$300. The claim is for money deposited in security of the defendant under the terms of a written lease, dated June 1916.

The defendant seeks to plaintiff and costs and basement of premises known as 1501 Milwaukee Avenue, to be occupied as a "7-cent" theater, from July 1, 1916, until April 30, 1917. In the first clause of the lease plaintiff agreed to pay the rent for said theater premises the sum of \$5,100, payable in monthly installments of \$425, except the last three months of this term which would end of \$450 each, been paid by the lessee as security upon this lease. The seventh clause is as provided: "If, at any time during the second year (plaintiff) shall abandon or vacate the premises, the same shall be held by the defendant for the first year. The plaintiff for each rent and upon such terms as may be agreed upon, see fit; and if a sufficient sum shall not be taken realized, after paying the expenses of such realization and collecting, to satisfy the rent hereby reserved, the defendant of the second year (plaintiff) shall be held to satisfy and pay all deficiency."

In his original affidavit of merits defendant alleged in substance that ~~said~~ <sup>the</sup> deposit was made as security for the performance of the covenants and conditions of the entire lease; that plaintiff failed to pay the rent due on May 1, 1911, and all subsequent installments; that defendant made efforts to re-rent the premises and collected rental for the same from new tenants commencing September 1, 1911, but did not receive any rents for the months of May, June, July and August, 1911; that defendant suffered loss by reason of plaintiff's failure to pay rent in the sum of \$600, and by reason of various disbursements and time expended in re-renting the premises in the additional sum of \$150; and that defendant was entitled to credit said deposit on said sums.

On the trial, before the court without a jury, ~~It~~ appeared ~~from the evidence~~ that plaintiff vacated the premises on the last Sunday in May, 1911; that ~~she~~ <sup>she</sup> then owed defendant ~~as rent for the month of May, 1911, the sum of \$150;~~ <sup>that</sup> that after such vacation defendant re-rented the premises to two tenants successively; that the first tenant went into possession some time during June or July 1911, and was given free rent until September 1, 1911; that said tenant or a sub-tenant paid rent from September 1, 1911, until March 1, 1912, at the rate of \$150 per month, and that on March 1, 1912, the premises were leased to another tenant from said date for a term expiring subsequent to April 30, 1913, at a monthly rental of \$175. Defendant admitted that there had been paid by plaintiff and by the two subsequent tenants, as rent for said premises for the term mentioned in plaintiff's original lease, the total sum of \$4,850, and that plaintiff had also deposited with defendant said sum of \$450 when the lease was signed. It thus appeared that including said deposit the total rental



In his original affidavit of service defendant

admitted in substance that said deposit was made as security for the performance of the covenants and conditions of the entire lease; that plaintiff failed to pay the rent due on May 1, 1911, and all subsequent installments; that defendant made efforts to recover the premises and collected rental for the same from new tenants commencing about May 1, 1911, but did not receive any rent for the months of May, June, July and August, 1911; that defendant was not less by reason of plaintiff's failure to pay rent in the sum of \$200, and by reason of various disbursements and expenses incurred in recovering the premises in the amount of \$100; and that defendant was entitled to credit said deposit on said sum.

On the trial, before the court without a jury, it appeared from the evidence that plaintiff vacated the premises on the last Sunday in May, 1911; that defendant was not defendant for the month of May, 1911, in payment of rent; that such vacation defendant rented the premises to two tenants successively; that the first tenant went into possession some time during June or July, 1911, and was given five rent until September 1, 1911; that said tenant or a sub-tenant paid rent from September 1, 1911, until March 1, 1912, at the rate of \$100 per month, and that on March 1, 1912, the premises were leased to another tenant from said date for a term expiring subsequent to April 30, 1912, at a rental of \$175. Defendant admitted that there had been paid by plaintiff and by the two subsequent tenants, as rent for said premises for the term mentioned in plaintiff's original lease, the total sum of \$4,800, and that plaintiff had also deposited with defendant said sum of \$200 when the lease was signed. It then appeared that including said deposit the total rental



paid for said premises during said term was \$5,300, whilst the total rental reserved in plaintiff's lease was \$5,100.

+ After the <sup>close of all the evidence</sup> testimony had all been taken and before the court had made a finding, the defendant asked and obtained leave to file and did file an amended affidavit of merits, in which he alleged in part that plaintiff had abandoned said premises; that defendant "has considered and treated said abandonment by plaintiff and her failure to pay rent as a termination of the tenancy and cancellation of the lease, and has made efforts to re-rent the premises to other parties and did so in his own name as owner"; and that in finding new tenants and negotiating new leases he expended time and effort and paid attorney's fees, etc. +

No further evidence was heard after the filing of this amended affidavit of merits. Notwithstanding the statement therein that when plaintiff vacated the premises defendant treated that act and plaintiff's failure to pay rent "as a termination of the tenancy and cancellation of the lease," and notwithstanding the fact that at the time of such vacation defendant had \$450 of plaintiff's money on deposit and that plaintiff only owed defendant the sum of \$150 for rent for the month of May, 1911, the court found the issues against the plaintiff and entered judgment in favor of the defendant for costs,

We are of the opinion that the trial court erred in the finding and in entering the judgment. We think that under the pleadings and evidence the court should have entered a judgment in favor of the plaintiff in the sum of \$300. Whether a lease has been cancelled and the tenancy terminated is a question of fact. (Fry v. Patridge, 73 Ill. 51, 53; Dills v. Stobie, 81 Ill. 202, 206.) It appears from the amended affidavit of merits of defendant that he considered that when plaintiff

paid for said premises during said term was \$5,000, whilst the total rental reserved in plaintiff's lease was \$2,100. After the testimony had all been taken and before the court had made a finding, the defendant asked and obtained leave to file and did file an amended affidavit of merits, in which he alleged in part that plaintiff had abandoned said premises; that defendant had considered and treated said abandonment by plaintiff and her failure to pay rent as a termination of the tenancy and cancellation of the lease, and has made efforts to re-rent the premises to other parties and did so in his own name as owner; and that in finding new tenants and negotiating new leases he expended time and effort and paid attorney's fees, etc.

No further evidence was heard after the filing of this amended affidavit of merits. Notwithstanding the statements therein that when plaintiff vacated the premises defendant treated her as if she had abandoned the premises and that plaintiff only used defendant the sum of \$200 for rent for the month of May, 1911, the court found the issues against the plaintiff and entered judgment in favor of the defendant for costs.

The opinion of the court was that the trial court erred in the finding and in entering the judgment. It was that under the pleadings and evidence the court should have entered a judgment in favor of the plaintiff in the sum of \$200, because a lease had been cancelled and the tenancy terminated as a question of fact. (W. v. W., 75 Ill. 2d, 33; W. v. W., 81 Ill. 2d, 306.) It appears from the amended affidavit of merits of defendant that he considered that when plaintiff

abandoned the premises the lease had been cancelled and the tenancy terminated. It further appears that at that time defendant had \$450 of plaintiff's money on deposit and that plaintiff only owed defendant for accrued rent the sum of \$150. The rights of the parties were fixed and determinable as of the date of such abandonment and cancellation of the lease, and defendant could resort to said sum on deposit for the purpose only of satisfying the rent due at that time and any loss or damage then accrued. (Chaude v. Shepard, 122 N. Y. 397; Caesar v. Robinson, 174 N. Y. 492; Cunningham v. Stockton, 81 Kan. 780.) The judgment of the Municipal Court is reversed, and judgment for \$300 is entered here against the defendant, William Kamin, and in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

FINDING OF FACTS. We find as facts that in May, 1911, the plaintiff, Philomina v. Shanklin, abandoned the premises in question, that at the time of such abandonment the lease in question was cancelled and plaintiff's tenancy terminated, and that at said time the defendant had in his possession the sum of \$300 belonging to plaintiff, no part of which has ever been paid to her.





201 - 21179

JAMES MONAHAN,  
Defendant in Error,

vs.

W. O. JOHNSON, Receiver of  
THE CHICAGO & MILWAUKEE  
ELECTRIC RAILROAD COMPANY,  
Plaintiff in Error.

ERROR TO  
CIRCUIT COURT,  
COOK COUNTY.

197 I.A. 633

STATEMENT OF THE CASE. The defendant by this writ of error seeks to reverse a judgment for \$2,500 rendered against him, as receiver, in the Circuit Court of Cook County, September 9, 1913, in favor of James Monahan, plaintiff, in an action for damages for personal injuries. The declaration consists of three counts. The first count alleges in substance that on July 31, 1911, the defendant, as receiver, was in possession and control of and was operating an electric railway running through the village of Glencoe, in said county; that on said day the defendant, by his servants, was <sup>then</sup> propelling an electric car along and upon the railway tracks in a southerly direction at or near the place where <sup>the</sup> said tracks intersected a public street, in said village, known as Scott avenue; that plaintiff was driving a team of horses and wagon upon and along <sup>that</sup> said public street and across <sup>the</sup> said tracks, and while he was in the exercise of ordinary care for his own safety the defendant so negligently managed and propelled <sup>the</sup> said electric car that because of such negligence the car ran into and struck plaintiff, and the wagon upon which he was riding, and plaintiff was thrown off the wagon and upon <sup>to</sup> the ground and was severely injured, etc. The second count sets up an ordinance of <sup>the</sup> said village requiring gates to be operated at said <sup>the</sup> crossing and charges <sup>defendant</sup> the negligent violation of the ordinance by defendant causing plaintiff's injury. The third count sets up an



James Johnson, Receiver of  
The Ohio & Michigan  
Electric Railroad Company,  
Plaintiff in Error.

vs.

James Johnson, Receiver of  
The Ohio & Michigan  
Electric Railroad Company,  
Plaintiff in Error.

ORDER TO

CLERK OF COURT

DO NOT FORGET

STATEMENT OF THE CASE. The defendant of this writ  
of error seeks to reverse a judgment for \$2,500 rendered  
against him, as receiver, in the Circuit Court of Cook County  
September 7, 1913, in favor of James Johnson, plaintiff, in a  
action for damages for personal injuries. The decision was  
in favor of the plaintiff. The first count alleged in substance  
that on July 21, 1911, the defendant, as receiver, was in  
possession and control of and was operating an electric rail-  
way running through the village of Illinois, as follows: On  
and by the defendant, by its receiver, and providing an  
electric car along and upon the railway tracks in a southerly  
direction at or near the place where the tracks intersected  
a public street in the village, upon the south side; that  
plaintiff, while driving a team of horses and wagon upon said  
said public street and across said tracks, and while he was  
the exercise of ordinary care for his own safety and the safety  
as negligently managed and operated said electric car that  
because of such negligence the car ran into and struck plain-  
tiff, and the wagon team which he was riding, and plaintiff  
was thrown off the wagon and upon the ground and was injured,  
injured, etc. The second count sets up an allegation of negli-  
gence requiring proof to be made of such negligence and  
charges the negligent violation of the ordinance and defendant  
causing plaintiff's injury. The third count sets up an

ordinance limiting the speed of trains to twelve (12) miles per hour and charges the negligent violation thereof by defendant, etc. A plea of the general issue was filed, also a plea denying possession or operation of the railroad by defendant. On the trial the evidence tended to show that ~~there was~~ a violation of both ordinances, ~~in that~~ no gates <sup>being</sup> were maintained or operated at <sup>the</sup> said crossing and that <sup>the speed of</sup> the car which collided with said wagon was ~~traveling~~ immediately prior to the collision at a speed greater than twelve miles per hour. It was contended by defendant that plaintiff could not recover because of his contributory negligence, but defendant's motions, made at the close of plaintiff's evidence and at the close of all the evidence, for a directed verdict in his favor, were both denied. The jury found the defendant guilty and assessed plaintiff's damages at the sum of \$2,500. Defendant's motions for a new trial and in arrest of judgment were overruled.

<sup>It appeared that</sup> Scott avenue, on the easterly side of the two parallel tracks of the electric railroad, runs in a north and south direction; the tracks run in a northwesterly and southeasterly direction; so that when one approaches the tracks on Scott avenue from the north and continues on he crosses the tracks diagonally. Northbound cars were run on the east track and southbound cars on the west track. On the westerly side of the tracks there is a turn in Scott avenue towards the west, and the street crosses the tracks of the Chicago & Northwestern Railroad Company substantially at right angles, which last named tracks are about 75 feet distant from the electric railroad tracks and run practically parallel therewith. For about three months prior to the accident plaintiff was employed as a teamster by certain contractors engaged in paving some of the streets in the village of Glencoe. He was about 58 years of age and his hearing and eyesight were good. During the





period of his employment he ~~went~~<sup>1</sup> over this crossing a  
~~good~~ many times and was thoroughly familiar with it, ~~and~~<sup>1</sup> and  
he knew that the electric railroad company ran both express  
and local trains over its tracks and that "express trains  
ran faster than the local trains." The accident happened  
about one ~~o'clock~~<sup>1 P.M.</sup> on the afternoon of July 31, 1911, shortly  
after plaintiff had finished eating his lunch. It was a bright,  
clear day. The ~~empty~~ wagon on which plaintiff was seated was  
an ordinary dump wagon with no coverings over or around the seat  
to obstruct his view. Plaintiff testified that as he approached  
the electric railroad tracks from the north on Scott avenue he  
was driving his team at a walk in the center of the road; that  
when the horses' heads were about 10 feet from the northbound  
~~east~~ track he stopped and looked both ways; that when he then  
looked north he could only see about 75 feet up the southbound  
~~west~~ track and that he did not see any car coming or hear any  
whistle; ~~that~~<sup>and</sup> then he started to cross the tracks and that ~~as he~~  
~~drove up~~ he "kept looking all the time"; that when the horses  
were on the west track and the wagon on the east track he first  
saw the approaching car, that it was then "right up against"  
him and that it struck the front wheel of the wagon; and that  
he did not know what happened ~~after~~<sup>the thing</sup> until he was helped  
upstairs to a doctor's office in Winnetka. It further appeared  
from the evidence that the train was an express train, ~~con-~~  
~~sisting of two cars, each 54 feet in length; that when it came~~  
~~to a stop after the collision the rear end of the rear car was~~  
about in the center of the street; that northwest of Scott  
avenue, and about 90 feet from the center of that street at its  
intersection with the east track, there is a shelter station  
and platform east of said east track; that northwest of said  
avenue there is a slight "S" or reverse curve in the tracks;  
but that, notwithstanding said curve and the position of said

... of the explosion ...  
... and ...  
... and local ...  
... in ...  
... of ...  
... after ...  
... of ...  
... an ...  
... to ...  
... the ...  
... was ...  
... when ...  
... "last" ...  
... looked ...  
... (last) ...  
... while ...  
... went ...  
... was ...  
... and ...  
... him ...  
... he ...  
... station ...  
... from ...  
... station ...  
... about ...  
... station ...  
... and ...  
... information ...  
... and ...  
... avenue ...  
... but ...



~~station and platform,~~ <sup>It appeared</sup> a person located in the center of Scott avenue at a point 19 feet east of said east track ~~could~~ see a car approaching from the north on the west track ~~when it is~~ 500 feet away, and that as said <sup>a</sup> person moves nearer ~~said east track~~ he can see a car ~~approaching from the north~~ at a greater distance. Several <sup>plaintiffs</sup> witnesses called by plaintiff testified as to the speed of the train and <sup>to</sup> not hearing any whistle ~~blown~~ immediately prior to the collision, ~~and as to what happened immediately thereafter.~~

~~Some of the~~ <sup>8</sup> defendant's witnesses testified in substance as follows: C. E. Woodward, a passenger sitting in the front car, testified that <sup>he</sup> ~~the~~ first thing he noticed ~~was the~~ whistling by the motorman, <sup>and</sup> ~~that then he noticed~~ the wagon ~~approaching the tracks~~ and that the team was walking and ~~that~~ the motorman continued to ~~blow the~~ whistle, and that the wagon continued ~~moving~~ towards the tracks, and that then the motorman decreased the speed of the car and tried to stop <sup>the car</sup> ~~it.~~ Thornton M. Pratt, ~~an attorney at law and a passenger in the front car,~~ testified that he felt <sup>shock</sup> ~~a jolting of the car~~ and heard ~~simultaneously~~ several blasts of the whistle; ~~that he looked out and saw a dump wagon, with two horses and a driver, approaching the track on which the car was running; that at~~ <sup>when</sup> ~~that time~~ the car was about 150 to 200 feet from the crossing and the horses were walking and their heads were about three feet from the east rail of said track; that at that time the reins were hanging loose and then he saw the driver reach for the reins and then they became taut, ~~and that then there was a crash, and the train ran a short distance and stopped.~~ Winifred Hamm, ~~a young lady attending high school and residing near the scene of the accident,~~ testified that she was standing on the platform east of the tracks, ~~waiting for a car going south,~~ and that she saw the wagon just before it crossed the northbound track. She further testified: "I saw the train coming ~~from where I was.~~ Before



coming to the curve he blew his whistle. \* \* I saw that the man did not see the car, and I yelled to him twice, but he did not seem to hear me. \* \* He looked asleep. He didn't do anything. His horses did not stop at any time. He did not stop and look up and down the track before he drove on. \*\* He was sitting stiff and the reins were down. He wasn't holding the reins." F. W. Wollett, employed in the composing room of a Chicago newspaper and a passenger in the front car, testified that he first noticed the extraordinary blowing of the whistle and looked out of the window and saw a wagon and a team of horses; that the horses were moving at a slow walk and that the driver appeared to be asleep; that when he first saw the team the horses had not quite reached the east track and that they were about three hundred feet from where the car then was; and that the horses continued to slowly move onto the tracks. Charles Litchfield, the motorman, testified that he gave the Scott avenue crossing signal by blowing the whistle when he was about 700 or 800 feet to the north of said crossing; that when he was 300 or 400 feet to the north of the crossing he first saw the horses and wagon, and that then he was running about 25 or 30 miles an hour; that he then reduced the speed of the car so that when approaching the station to the north of the crossing the car was going about 11 miles per hour; that as he approached the station he gave several short blasts of the whistle; that the driver on the wagon (plaintiff) did not seem to pay any attention to the signals, that he did not look in the direction of the approaching train or make any attempt to stop; that when the witness applied the brakes and "reversed the car" and that when the car was right close to the team the driver "picked up the whip and started to lash the horses to get by."



coming to the curve he blew his whistle. "I saw that the man did not see the car, and I yelled to him twice, but he did not seem to hear me. I was looking at him all the time. His horse did not stop at any time. He did not stop and look up and down the track before he drove on. He was sitting still and the reins were down. He didn't hold the reins." F. J. Volante, who was in the rooming room of a Chicago apartment with a bathroom in the front, testified that he first noticed the extraordinary driving of the whistle and looked out of the window and saw a wagon and a team of horses; that the horses were moving at a slow walk and that the driver appeared to be asleep; that when he first saw the team the horses had not quite reached the next track and that they were about four hundred feet from where the car then was; and that the horses continued to slowly move on the track. Charles Fitzfield, the motorist, testified that he gave the -colt wagon driving signal by blowing the whistle when he was about 700 or 800 feet to the north of and crossing the track when he was 500 or 600 feet to the north of the crossing. He first saw the horse and wagon, and that then he saw the car. It or so miles an hour; that he then reached the speed of the car as that when he reached the station he was north of the crossing the car was going about 10 miles per hour; that he approached the station he gave several short blasts of the whistle; that the driver on the wagon (Fitzfield) did not seem to pay any attention to the whistle; that he did not look in the direction of the approaching train or make any attempt to stop; that when the witness spotted the horse and wagon on the track that when the car was right close to the team the driver picked up the whip and started to lead the horse to get by."

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant (1) that plaintiff was guilty of contributory negligence and therefore cannot recover, and (2) that the trial court erred in refusing to give to the jury two instructions, Nos. 26 and 27, offered by the defendant. In the view we take of this case it will be unnecessary for us to discuss counsels' second point.

After a careful review of the evidence contained in the transcript we think that it clearly appears that plaintiff was not in the exercise of due care for his own safety when crossing defendant's tracks at the time and place mentioned, and that consequently he cannot recover of the defendant for the injuries he sustained. He testified in substance that shortly before he started to cross the tracks he looked to the north and did not see any southbound car approaching, that he kept on looking, and that it was not until his horses were on the west track and the wagon on the east track that he first saw the approaching car, at which time it was right up against him. But it appears from the evidence that several witnesses on said car saw him, and his wagon and horses, just before the horses went upon the tracks and when the car was over 200 feet north of the crossing, and it further appears that just before the horses (which were walking and could be quickly stopped) had reached the east track plaintiff had an unobstructed view of any train approaching from the north for a distance of over 500 feet. We think that the evidence clearly establishes the fact that plaintiff failed to look to the north when he should have looked. Had he looked he could have seen the car and stopped his team in ample time to have avoided the collision. He was himself guilty of negligence which proximately contributed to his injuries. In Chicago, R. I. & P. Ry. Co. v. Jones, 135 Ill. App. 380, 383, it is said: "It



and testimony to the jury in the case of the jury.

It is contended by counsel for defendant (1) that plaintiff was guilty of contributory negligence and therefore cannot recover, and (2) that the trial court erred in refusing to give to the jury two instructions, Nos. 30 and 31, offered by the defendant. In the view we take of this case it will be unnecessary for us to discuss counsel's second point.

After a careful review of the evidence contained in the transcript we think that it clearly appears that plaintiff was not in the exercise of due care for his own safety when crossing defendant's track at the time and place mentioned, and that consequently he cannot recover of the defendant for the injuries he sustained. He testified in substance that shortly before he started to cross the track he looked to the right and did not see any approaching car or engine, that he kept on looking, and that it was not until his horses were on the west track and the wagon on the east track that he turned his head around and saw the approaching car, at which time it was about 100 feet from him. But it appears from the evidence that several witnesses on both sides of the track, and the wagon and horses, that the horses were upon the track and were on the east side over 100 feet north of the crossing, and it further appears that just before the horses (which were walking and could be easily stopped) had reached the east track plaintiff had an obstructed view of the train approaching from the north for a distance of over 100 feet. We think that the evidence clearly established the fact that plaintiff failed to look to the north when he should have looked. Had he looked he would have seen the car and stopped his team in ample time to have avoided the collision. He was himself guilty of negligence which proximately contributed to his injuries. In Patton v. I. & N.T. Ry. Co. v. Jones, 120 Ill. App. 500, 503, he is said: "We

is the duty of one approaching a railroad crossing upon a highway to look and listen for approaching trains, if a reasonably prudent person, so situated, would look and listen, and a failure to look and listen precludes a recovery for personal injuries where to have looked and listened would have prevented the injury, and where there were no circumstances or conditions justifying such failure to look and listen and no obstructions to the view." And in Chicago, P. & St. L. Ry. Co. v. De Freitas, 109 Ill. App. 104, 106, it is said: "The law will not tolerate the absurdity of allowing a person to testify that he looked, but did not see the train, when the view was unobstructed, and where, if he had properly exercised his sight, he must have seen it." And the following other cases may with propriety be cited: Toledo, St. L. & W. R. Co. v. Gallagher, 109 Ill. App. 67, 69; Wabash P. Co. v. Kamradt, 109 Ill. App. 203; <sup>211</sup>Toledo, St. L. & W. R. Co. v. Christy, 111 Ill. App. 247; Hauk v. Peoria Ry. Co., 154 Ill. App. 473, 475; Brand v. Osborne, 184 Ill. App. 11.

The judgment of the Circuit Court is reversed.

REVERSED.

MR. JUSTICE MCCOORTY DISSENTING: I feel compelled to dissent from the opinion of the majority of the court that the plaintiff was guilty of contributory negligence, requiring a reversal of the judgment, but am of the opinion that the trial court erred in refusing to give either of defendant's instructions, Nos. 26 and 27, respectively, and that because of such error the judgment should be reversed and the cause remanded.



FINDING OF FACTS. We find as ultimate facts that the plaintiff, James Monahan, was not in the exercise of due care for his own safety, and was himself guilty of negligence, while attempting to cross the tracks mentioned in the declaration and at the time and place mentioned, and that in consequence thereof he received the injuries complained of.

to 7 p.m. daily - but a

that the Plaintiff, James Thompson, was not in the exercise of due care for his own safety, and was himself guilty of negligence, while attending to erect the truck mentioned in the caption and that the Plaintiff and the truck mentioned in the caption were not in the exercise of due care and that the Plaintiff is responsible for the injuries sustained by the Plaintiff.



221 - 21199

WILLIAM H. BELLE,  
Defendant in Error,

vs.

BERNHARD ROSENSTIEL,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 637

STATEMENT OF THE CASE. On September 12, 1913,

William H. Belle, plaintiff, commenced in the Municipal Court of Chicago a fourth class action in tort against Bernhard Rosenstiel and Abraham Stiefel (copartners trading as the Grove Furniture and Carpet Company) and Ed. Rosenstiel. Plaintiff sought to recover damages in the sum of \$1,000 because of an alleged assault and battery and an alleged malicious prosecution of plaintiff by defendants. ~~Plaintiff~~ <sup>alleged</sup> further ~~alleged~~ in his second amended statement of claim, in substance, that on July 9, 1913, the defendants in pursuance of a conspiracy went to ~~Wabers department~~ <sup>a</sup> store in ~~the city of~~ Chicago, where plaintiff was ~~then~~ employed, and ~~then and there~~ assaulted, beat, struck and otherwise maltreated plaintiff; ~~that afterwards~~ <sup>and</sup>, on July 10, 1913, the defendants, conspiring and maliciously intending to injure plaintiff, caused a warrant to be issued out of said Municipal Court for the arrest of plaintiff upon a complaint charging plaintiff with an assault and battery, etc., and caused plaintiff to be arrested and kept in jail for the period of four hours; that on July 30, 1913, plaintiff, upon a trial being had, was found not guilty of said supposed offenses <sup>and</sup> ~~and~~ <sup>and duly</sup> was duly acquitted and discharged; and that the prosecution against plaintiff for said supposed offenses had wholly ended.

The ~~three~~ defendants entered a joint appearance and

WILLIAM H. KELLY,  
Defendant in Error,

vs.

UNITED STATES

OF DISTRICT

191 A. 687

WILLIAM H. KELLY,  
Defendant in Error,

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

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Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

Plaintiff in Error, vs. UNITED STATES

The undersigned hereby certifies that the foregoing is a true and correct copy of the original as the same appears in the files of the Department of Justice.

filed separate affidavits of merits. ~~4~~ The cause was tried before a jury resulting in a verdict, entered October 26, 1914, finding the defendant Abraham Stiefel not guilty, but finding the defendants Bernard Rosenstiel and Ed. Rosenstiel guilty, and assessing plaintiff's damages at the sum of \$1,000. These two last named defendants entered motions for a new trial and subsequently the court, on plaintiff's motion, on January 15, 1915, dismissed the suit as to Ed. Rosenstiel, denied Bernard Rosenstiel's motions for a new trial and in arrest of judgment, and entered judgment against Bernhard Rosenstiel for \$1,000, which judgment it is sought by this writ of error to reverse.

~~It appears from the evidence that in April, 1913,~~  
plaintiff purchased some household furniture of the ~~company~~  
~~known as the Grove Furniture and Carpet Company (hereinafter referred to as Furniture Co.), and made certain partial~~  
payments thereon and the furniture ~~was delivered to~~ <sup>delivered</sup> plaintiff's residence. Subsequently plaintiff ascertained that he ~~would be~~  
~~unable to make further payments on the furniture and,~~ <sup>and</sup> according  
~~to evidence introduced on behalf of plaintiff, it was agreed~~ <sup>plaintiff's</sup>  
~~between plaintiff and Ed. Rosenstiel, son of Bernhard Rosenstiel~~  
and an employe of the Furniture Co., that plaintiff's mother,  
residing in a different part of the city, might move the  
furniture to her residence and make ~~further~~ <sup>the</sup> payments, ~~thereon,~~  
and the furniture was so moved. Early in July, 1913, the  
Furniture Co. sent an employe to ~~aid~~ <sup>the</sup> mother's home to demand  
the return of the furniture to the Furniture Co., but ~~said~~ <sup>the</sup>  
~~mother refused to deliver up the furniture. On the afternoon~~  
~~of July 9, 1913, Bernhard Rosenstiel and Ed. Rosenstiel called~~  
on plaintiff ~~on~~ <sup>at</sup> the second floor of Weber's department store,  
where plaintiff was employed, ~~as a salesman,~~ and inquired of him  
why ~~further~~ payments had not been made ~~on the furniture or the~~



filed separate affidavits of service. The court was advised  
before a jury resulting in a verdict, entered before  
1914, finding the defendant's actions to be negligent, and  
finding the defendant liable for damages in the amount of  
\$1,000. The court also awarded costs to the plaintiff.  
On January 10, 1915, the court entered a judgment  
denying the defendant's motion for a new trial and in  
favor of judgment, and entered judgment against the  
defendant for \$1,000, which judgment it is sought by this  
bill of error to reverse.

It is respectfully submitted that in 1911, 1912,  
1913 and 1914, the defendant's actions were negligent  
and that the plaintiff was damaged by the defendant's  
actions. The plaintiff's damages were \$1,000, and the  
defendant was liable for the same. The court entered a  
judgment in favor of the plaintiff for the amount of  
\$1,000, and awarded costs to the plaintiff. The court  
also entered a judgment denying the defendant's motion  
for a new trial. The court's judgment is sought to be  
reversed by this bill of error.

furniture returned. According to Plaintiff's testimony, <sup>than on his</sup> upon plaintiff attempting to explain matters, Bernhard Rosenstiel began using loud, profane and abusive language, accused plaintiff of stealing the furniture and of being a thief, and further said: "When we get through with you, you won't have any job. We will follow you to the end of the earth. Not only that, we will take you down in the alley and kick your \* \* head off." <sup>Thereupon</sup> Bernhard Rosenstiel took off his glasses and put them in his pocket, and subsequently

<sup>Thompson</sup> both the Rosenstiels either struck at or struck plaintiff, and a scuffle ensued during which Bernhard Rosenstiel was either pushed over a chair, or was struck, and received an injury in the head requiring the services of a physician. <sup>Both the</sup> Rosenstiels testified that the first blow was struck by plaintiff, but two of plaintiff's witnesses, who were onlookers, testified that the Rosenstiels were the aggressors.

① Bernhard Rosenstiel testified that after leaving ~~Leban's store~~ he went to a physician's office for treatment, <sup>and then went to</sup> and didn't do anything else that day," except after leaving said office, to take the train for his summer home at Fox Lake, Illinois. Ed.

<sup>the</sup> Rosenstiel testified that he accompanied his father to said Fox Lake train and that they talked over the question of arresting plaintiff. Bernhard Rosenstiel further testified that on the following morning, July 10th, he arrived in Chicago from Fox Lake about 8:45; that he then <sup>and</sup> consulted his attorney at the latter's Chicago Office, <sup>and</sup> told him of the occurrences, on the previous afternoon, and was advised by said attorney to have plaintiff arrested; and that then he went to the Municipal Court and <sup>and</sup> signed, made affidavit to and filed a complaint against plaintiff, somewhere around 10 o'clock that day. <sup>at about</sup> The record of said suit, which was introduced in evidence, disclosed that the complaint of B. Rosenstiel was filed July 10, 1913; that it was alleged





~~in the complaint~~ that on July 9, 1913, William H. Selle did aid and assist in a riot and breach of the peace, and did unlawfully and wilfully assault another person, that Selle will escape unless arrested and that he is not a resident of the city of Chicago, is only temporarily in said city and is about to depart the same; that a warrant was issued ~~for the arrest of Selle~~ <sup>plaintiff</sup> and that he was arrested and brought into court July 18th, and that after a full hearing ~~had on July 30th, 1913, he was found not guilty and discharged, from custody.~~ Plaintiff testified that he ~~was arrested about 8:30 in the morning and was confined in a cell for about four hours when~~ <sup>before</sup> he was released on bail. It further appeared ~~from the evidence that after plaintiff's arrest and up to the time of the trial of the present action plaintiff's mother had made further payments from time to time on said furniture to said Furniture Co.~~ <sup>this</sup> ~~the~~ ①

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for plaintiff in error that the verdict is contrary to the weight of the evidence, in that (a) the preponderance of the evidence shows that Selle was not assaulted by plaintiff in error, and (b) the preponderance of the evidence shows that plaintiff in error had probable cause for suing out the warrant and having Selle arrested and was not actuated by malice in so doing. We cannot agree with counsel and are of the opinion that the verdict is fully warranted by the evidence.

It is also contended that because plaintiff in error testified that he acted on the advice of his attorney in causing Selle's arrest he is not liable in any amount in the present action. While it is the law of this state that if a party communicate to counsel all the facts bearing upon the guilt

in the complaint that on July 9, 1913, William H. Wells did aid and assist in a riot and breach of the peace, and did unlawfully and wilfully assault another person, that Wells will escape unless arrested and if he is not a resident of the city of Chicago, is only temporarily in said city and is about to depart the same; that a warrant was issued for the arrest of Wells and that he was arrested and brought into court July 18th, and that after a full hearing had on July 20th, 1913, he was found not guilty and discharged, every day. Plaintiff testified that he was arrested from 8:30 in the morning and was confined in a cell for about four hours when he was released on bail. It further appeared from the witness that after plaintiff's arrest and up to the time of the trial of the present action plaintiff's mother had made further payments from time to time on said warrant to Wells Furniture Co.

MR. PROSECUTOR IN VIEW CRIMINAL COMPLAINT FOR ARREST OF THE CO.

It is first contended by counsel for plaintiff in error that the verdict is contrary to the weight of the evidence, in that (a) the preponderance of the evidence shown that Wells was not assaulted by plaintiff in error, and (b) the preponderance of the evidence shows that plaintiff in error has established cause for suing and the verdict and finding is erroneous and was not sustained by evidence in the law. We cannot agree with counsel and set of the verdict that the verdict is fully warranted by the evidence.

It is also contended that because plaintiff in error testified that he acted on the advice of his attorney in suing Wells's arrest he is not liable in any amount in the present action, while it is the law of this state that in a party communicates to counsel all the facts bearing upon the case



of the accused, of which he has knowledge or could have ascertained by reasonable diligence, and in good faith acts upon the advice of such counsel, he cannot be held responsible for his conduct in an action for malicious prosecution (Anderson v. Friend, 71 Ill. 475, 479), yet it is also the law that before a party in such an action can shield himself under the plea of advice of counsel it must appear from the evidence that he in good faith made a full and fair statement of all material facts to such counsel and in good faith acted upon the advice given. (Roy v. Goings, 112 Ill. 656, 664.) And whether the party has fairly communicated to his counsel all the material facts, and whether he acted in good faith upon the advice received, are questions of fact to be determined by the jury from all the evidence. (Anderson v. Friend, supra; Schattgen v. Holnback, 149 Ill. 646, 651; Gruel v. Mengler, 74 Ill. App. 36.) It is evident from the jury's verdict in the instant case that they did not believe plaintiff in error's testimony, to the effect that in causing Selle's arrest he acted upon the advice of an attorney, but rather believed that he acted upon his own initiative and acted maliciously, and under all the evidence we are not disposed to disturb their verdict.

It is further contended that the court, during the progress of the trial, made certain remarks prejudicial to plaintiff in error. We do not think that the language was prejudicial, or that the jury were misled thereby, particularly when taken in connection with the instructions which the court afterwards gave. Neither do we think that the court committed prejudicial error in his rulings on the admissibility of certain evidence, as urged by counsel.

It is further contended that, the jury having found the defendant Stiefel not guilty and both the Rosenstiels guilty, the court erred in dismissing the suit, on plaintiff's motion,

of the accused, of which he has knowledge or could have ascertained by reasonable diligence, and in good faith acts upon the advice of such counsel, he cannot be held responsible for his conduct in an action for malicious prosecution (Anderson v. Friend, 71 Ill. 470, 471). Yet it is also the law that before a party in such an action can shield himself under the plea of advice of counsel it must appear from the evidence that he in good faith made a full and fair statement of all material facts to such counsel and in good faith acted upon the advice given. (Roy v. Goings, 122 Ill. 686, 687.) And whether the party has fairly communicated to his counsel all the material facts, and whether he acted in good faith upon the advice received, are questions of fact to be determined by the jury from all the evidence. (Anderson v. Friend, supra; Robertson v. Holbrook, 119 Ill. 616, 621; Gray v. Mangler, 74 Ill. App. 36.) It is evident from the jury's verdict in the instant case that they did not believe plain- tiff in error's testimony, to the effect that in causing belief arrest he acted upon the advice of an attorney, but rather believed that he acted upon his own initiative and acted maliciously, and under all the evidence we are not disposed to disturb their verdict.

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It is further contended that the jury having found the defendant liable not guilty and both the Prosecution and the court erred in sustaining the writ of habeas corpus.



as to Ed. Rosenstiel and in entering judgment against plaintiff in error alone. This being an action in tort we do not think any error was committed in these particulars.

(Illinois Central R. Co. v. Foulks, 191 Ill. 57, 69;

Lasher v. Littell, 202 Ill. 551, 555.)

It is finally contended that the verdict and judgment are excessive. The amount of damages to be awarded in such actions as the present one is always a question for the jury, and unless the verdict is manifestly excessive it should not be disturbed. (Pearce v. Needham, 37 Ill. App. 90-93; Reno v. Wilson, 49 Ill. 95; Nelson v. Danielson, 82 Ill. 545.) Punitive damages are recoverable where the arrest is made under circumstances that indicate a wanton disregard of the rights of the person arrested (Pearce v. Needham, *supra*), or where the arrest is procured by means of an untrue affidavit. (Roth v. Smith, 54 Ill. 431.) In Cartwright v. Elliott, 45 Ill. App. 458, the court, in referring to the amount of damages to be awarded in cases of malicious prosecution, says (p.461): "There should be a wide difference between the punishment of one who has failed to slightly use ordinary care, and who acts without justifiable cause and without malice in fact, and one who is intent on doing another a wrong and makes use of the criminal process for the purpose of gratifying his hatred and ill-will. Every case should be governed by its own facts and decided according to the dictates of reason and equity." While it may seem that the amount of damages awarded in the present case is large, we do not think that under all the evidence it is so manifestly excessive as to indicate passion or prejudice in the minds of the jury. Neither do we think that we would be justified in reducing the amount of the verdict and judgment. (Hildreth v. Hancock, 55 Ill. App. 572, 576.)

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plaintiff in error alone. This being an action in tort we  
do not think any error was committed in these particulars.  
(Illinois Central Co. v. Toole, 101 Ill. 2d, 59;  
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33; Reno v. Wilson, 49 Ill. 2d, 95; Nelson v. Davidson, 82 Ill.  
543.) Punitive damages are recoverable where the wrong is  
made under circumstances that indicate a wanton disregard of  
the rights of the person arrested (Parker v. Boardman, 117 Ill.  
or where the wrong is proved by means of an untrue affidavit  
(Both v. Smith, 54 Ill. 531.) In Carroll v. Litchell, 10  
Ill. App. 458, the court, in referring to the amount of  
damages to be awarded in cases of malicious prosecution, says  
(p. 461): "There should be a wide difference between the  
punishment of one who has failed to slightly use ordinary  
care, and one who without justification can and without  
malice in fact, and one who is intent on doing another a  
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of reason and equity." While it may seem that the amount of  
damages awarded in the present case is large, we do not think  
that under all the evidence it is so manifestly excessive as  
indicates passion or prejudice in the minds of the jury.  
Neither do we think that we would be justified in reducing the  
amount of the verdict and judgment. (Hilbreth v. Hancock, 55  
App. 542, 546.)

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

finding no reversible error in the record the

judgment of the Municipal Court is affirmed.

APRIL 1934.

177 - 21154

WORLD PUBLISHING COMPANY,  
(a corp.),  
Defendant in error,  
  
vs.  
  
HARRY R. FISHER,  
Plaintiff in error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

197 I.A. 641

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff (defendant in error) claimed as due from defendant (plaintiff in error), and recovered judgment for, \$537.07, the price of advertising less commissions done at defendant's request and pursuant to a contract between them. Defendant admitted existence of the contract but claimed in effect that moneys he had paid plaintiff in the course of their contractual relations were advances on his part in excess of what the contract required. Accordingly he filed a set-off claiming a balance in his favor. He also claimed non-liability because plaintiff had interfered with his collection of certain advertising accounts.

Trial was had before the court without a jury. It holding that under the pleadings and court rules applicable thereto, plaintiff's claim was admitted and that the affirmative of the issue was with defendant to establish his set-off, defendant accepted the ruling by proceeding to put in his proof.

The errors assigned are substantially two, that the finding was against (1) the evidence and (2) the law. Plaintiff in error admits, however, that a decision of either calls for a construction of the contract. But the record in no way presents the question for consideration.



WORLD BUILDING COMPANY,  
(A corp.)

Defendant in error,

vs.

JOHN J. FINE,  
Plaintiff in error.

WITNESSES

ON BEHALF OF

1971 A. 64

ALL THINGS BEING WELL, THE JUDGE OF THE COURT.

Plaintiff (defendant in error) claimed on the  
 from defendant (plaintiff in error), and recovered judgment  
 for, 1957.07, the price of advertising first commission  
 some of defendant's request and payment to a contract  
 between them. Defendant admitted existence of the contract  
 but claimed in effect that although he had paid plaintiff in  
 the course of their contracted relations were otherwise  
 on his part in excess of what the contract provided.  
 Accordingly he filed a motion to set aside the judgment in his  
 favor. He also claimed non-liability because plaintiff  
 had interfered with his collection of certain advertising  
 proceeds.

Trial was held before the court without a jury.

It holding that under the agreement and under rules applicable  
 thereto, plaintiff's claim was barred and that the  
 affirmative of the issue was with defendant to establish  
 his defense, defendant requested the ruling by proceeding to  
 pay in his favor.

The court assigned the responsibility too, that  
 the finding was against (1) the witness and (2) the law.  
 Plaintiff in error sought, however, that a decision of  
 either side for a consideration of the contract. But the  
 court in its own process the question for consideration.

No objection is pointed out, no motion was made, except for a new trial which in a case tried without a jury preserves no question for review (Climax Tag Co. v. American Tag Co., 234 Ill. 179), and no proposition of law calling for a construction of the contract or any other holding was submitted to the court. There being no ruling of the court upon which to predicate error no question of law is before us. (Grabbs v. City of Danville, 166 id. 441; Flodin v. W. H. Lutes Co., 191 Ill. App. 195; Overland Motor Co. v. Tennant, 193 id. -.) Otherwise we would be required to read the entire evidence to gather the court's theory of the contract or of other questions of law that might have arisen. For aught we know whatever view the court took of the contract it may, as it could have done, have decided the issues on other grounds. It may have held, as it properly might, that plaintiff's items of account were admitted and that there could be no recovery on defendant's set-off for moneys advanced because, even though made under mistake of law, they were voluntarily paid with full knowledge of all the facts and without any fraud, duress or extortion. (People v. Foster, 133 Ill. 509; Village v. Knopf, 199 id. 466; Yates v. Royal Ins. Co., 200 id. 206.)

Neither does the record preserve for review the court's ruling that under the state of the pleadings it was unnecessary for plaintiff to put the contract in evidence. Regardless of the ruling defendant's proof involved recognition of the terms of the contract.

While absence of an exception to the judgment would not prevent consideration of the sufficiency of the



evidence (Miller v. Anderson, 269 id. 608) it is conceded that its sufficiency depends on a decision of questions of law that are not before us.

The state of the record requires us to affirm the judgment.

AFFIRMED.

evidence (Miller v. Johnson, 100 U.S. 371) it is established  
that the testimony depends on a decision of questions of  
fact that are before us.

The state of the record requires us to affirm  
the judgment.

Reversed.



MARIE A. HESSE, Administratrix  
of the Estate of Frances  
Branitzky, deceased,  
Defendant in Error,

vs.

JOHN A. COLBY & SONS, a corporation,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

197 T A 642

STATEMENT OF FACTS. Frances Branitzky was

employed as a sales woman by plaintiff in error defendant

~~below~~ for many years, and ~~as such~~ <sup>and</sup> became specially  
<sup>as such</sup> valuable. In May 1908 she was injured by an explosion in

a building occupied by defendant. Under date of February

11, 1910, she executed a general release <sup>to defendant and others</sup> in consideration

of \$6,068.20 then paid to her whereby defendant and others

therein named were forever discharged from any causes of

actions, suits, debts, agreements, etc., which she then had

or she or her administrators might thereafter have against

them.

Under date of February 9, 1910, she entered

into the following <sup>Agreement</sup> agreement with defendant which refers to

<sup>the</sup> said general release as executed therewith, to-wit: <sup>in part</sup>  
<sup>as follows</sup>

"This Agreement made and entered into this  
ninth day of February, A. D. 1910, by and between John  
A Colby & Sons, an Illinois corporation with its  
principal place of business at Chicago, in said State  
of Illinois, party of the first part, and Frances  
Branitzky, of the City of Chicago, County and State  
aforesaid, party of the second part, Witnesseth:

That in consideration of a general release  
herewith executed by the party of the second part, to  
the party of the first part and others, and as a part  
of the consideration for said general release, the  
party of the first part promises and agrees to pay  
to the party of the second part the sum of three thousand  
dollars (\$3,000), payable monthly, commencing February  
1st, 1910, said sum to be payable in equal installments  
of fifty dollars (\$50) per month.

The party of the second part, as a part of  
the consideration for this payment, agrees that during  
the five years from February 1st, 1910, she will perform  
such clerical services for the party of the first part  
as she may be called upon to do and as she may be

James A. Hume, Administrator  
of the State of Illinois  
Administrative, General,  
Department in Error,

TO:

ADMINISTRATIVE

ST. LOUIS, MO.

James A. Hume, a corporation,  
Plaintiff in Error.

107 - 2111

STATEMENT OF FACTS.

James A. Hume, a corporation, was employed as a sales agent of the State of Illinois.

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James A. Hume, a corporation, was employed as a sales agent of the State of Illinois.

physically able to perform without injury to her health or strength.

It is understood and agreed by the parties hereto that the hours of the party of the second part for such services shall be easy and that she shall be the judge as to whether or not she is able to work during said period of time, the meaning and intention being that the party of the second part shall perform such clerical work for the party of the first part as she is able to perform without injury to her health or strength during said period.

In Witness Whereof the party of the first part has caused these presents to be signed by its President and Secretary and its corporate seal annexed, and the party of the second part has signed and sealed these presents the day and year first above written.

JOHN A. COLBY & SONS,  
By Henry C. Colby,  
President.  
Frances Branitzky,  
(Seal)

Attest:  
Harry J. Ilett,  
Secretary."

Pursuant to said agreement defendant paid plaintiff's intestate \$50 each month (\$1800 in all) up to the time of her death in February, 1913. <sup>immediately</sup> During that time she rendered no services for defendant, but rendered <sup>similar</sup> services of a similar nature for another firm from October 1912 until the month before her death, working eight and one-half hours a day, for which she was paid wages at the rate of \$10 per week. \*

This suit was based on said contract to collect seven installments of \$50 each for the seven months immediately following her death. The case was heard without a jury, and the finding and judgment were for plaintiff for the amount claimed.



physically able to perform without injury to the  
mind or strength.  
It is understood and agreed by the parties  
hereto that the party of the first part shall be  
for such services shall be paid at the rate of \$100  
per month or not less than \$100 per month during  
the term of the contract. The parties have agreed  
that the party of the second part shall perform  
such clerical work for the party of the first part as  
may be required without injury to her health or  
strength during the term of the contract.  
In witness whereof the party of the first  
part has caused these presents to be signed by its  
President and Secretary and its corporate seal hereunto  
and the party of the second part has signed and sealed  
these presents the day and year first above written.

JOHN A. [illegible]  
[illegible]  
President  
[illegible]  
[illegible]

Attest:  
Harry L. [illegible]  
Secretary

reference to said agreement. The party of the first  
part shall be for such services shall be paid at the rate of \$100  
per month or not less than \$100 per month during the term of the  
contract. The parties have agreed that the party of the second part  
shall perform such clerical work for the party of the first part as  
may be required without injury to her health or strength during the  
term of the contract. In witness whereof the party of the first part  
has caused these presents to be signed by its President and Secretary  
and its corporate seal hereunto and the party of the second part has  
signed and sealed these presents the day and year first above written.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim did not disclose, but the affidavit of merits did, the fact that the suit was for installments covering a period of time after the death of plaintiff's intestate. If the contract be construed as one for personal services, as we think it should, then with such fact of her death standing unquestioned, the pleadings presented no legal cause of action, provided the contract sued on and "annexed" to the statement of claim was a part of the pleading. It would not be so deemed under the practice in our other courts of law (Jones v. City of Chicago, 167 Ill. App. 175, and cases cited) and whether so under the Municipal Court rules is not made to appear. However, it seems to have been so treated by both parties, and defendant's affidavit of merits was predicated upon existence of such contract. Giving a liberal construction to a loose system of pleading and practice, we think it can be said that the parties having, in their mutual understanding of the nature of the case, treated the contract as a part of the pleadings and, as an admitted fact therein, that decedent died before any of said installments sued for fell due, ~~we think~~ the pleadings presented a mere question of law, and that no judgment for plaintiff could stand thereon.

The contract was neither ambiguous nor uncertain. Its construction required no proof of extraneous facts or circumstances. Its language is unequivocal and should be construed as written (Park v. Mallory, 185 Ill. 227, 232.) It expressly called for such work by plaintiff's intestate as she was able to perform during the five years the contract was to be in force. While it made her the judge of whether she was able to work, yet it did not thereby leave



1. The first group of people who are not allowed to enter the country are those who are on the "No Fly List". This list is maintained by the Federal Bureau of Investigation (FBI) and the Department of Homeland Security. It includes individuals who are suspected of being involved in terrorism or other activities that could threaten the national security.

... ..

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

90 11

11. The company is not a party to the contract.

and the Government have been very helpful.

with a view to the future of the country.

the various, and to some extent as follows:

[illegible][illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

list of United States ...

whether or not the United States is

Approved: \_\_\_\_\_, Director, Bureau of Land Management

1946-1947-1948-1949-1950-1951-1952-1953-1954-1955-1956-1957-1958-1959-1960-1961-1962-1963-1964-1965-1966-1967-1968-1969-1970-1971-1972-1973-1974-1975-1976-1977-1978-1979-1980-1981-1982-1983-1984-1985-1986-1987-1988-1989-1990-1991-1992-1993-1994-1995-1996-1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764

upon a table, of such a size, that

THE UNIVERSITY OF CHICAGO

...the fact that it, instead of being a

ing of the nature of the case, limited the number of

and, since the total number of nodes is  $n$ , the number of nodes in the subtree rooted at  $v$  is  $n - |V|$ .

[illegible]

XXXXXXXXXXXX

[illegible]

The contract was not for the purpose of the contract.

The construction indicated on drawing is not to be

SECRET

(SAC, FBI, NEW YORK; SAC, NEW YORK; SAC, NEW YORK)

[illegible]

and they are not subject to the same restrictions as the other two.

to report, and that when it will, we will be at your disposal

it optional with her to work or not, but called for a bona fide exercise of her judgment in that regard. It contemplated that whenever she was able to work during that period defendant was to have the benefit of her services; and it manifestly further contemplated, whether construed with or apart from the general release, that in addition to the sum paid for the latter, defendant was to furnish her employment for five years at a monthly salary of \$50 without deductions for absence when she was unable to work. This we think is the construction the contract calls for on its face.

As there was no issuable fact before the court and the pleadings presented no cause of action, no testimony was necessary to a decision. On motion the court could have entered judgment for defendant without evidence. No motion therefor, however, was made until the close of plaintiff's case, on which the court reserved its ruling until all the evidence was in when it was adversely decided.

But there was nothing in the evidence, whether admissible for construction of the contract or not, that justified a different construction than should be given on its face. No purpose, therefore, would be subserved by a review of the evidence or other proceedings in the trial.

The contract being one for the personal services of plaintiff's intestate it was terminated by her death (see authorities cited on this subject in notes to Wendenhall v. Davis, 21 L. R. A. (N.S.) 914.)

As plaintiff was not entitled to judgment as a matter of law, it will be reversed.

REVERSED.

it is optional with her to work or not, but calling for a  
some time extension of her judgment in the matter. It  
 contemplated that when she was this in work this

that during the period was to have the benefit of her  
 services; and it was intended to have her services, whether  
 consistent with or against her own best interests, that in  
 addition to the time she was to have, she was to be  
 furnished her employment for five years at a monthly salary  
 of not less than \$100.00 per month. It was intended  
 to work. This is what is the consideration for the contract  
 calls for on the face.

as there was no intention to have her work  
 and the plaintiff presented no case of action, no testimony  
 was necessary to a decision. In making the above facts  
 stated, however, you have said that the plaintiff's  
 name, or which she was to have, is the thing which all the  
 evidence was in favor of the plaintiff's name.

One thing was shown in the evidence, whether  
 maintain the contract of the plaintiff as to, that  
 plaintiff's contract was not shown to have  
 on the face. It is suggested, would be necessary  
 by a review of the evidence on other grounds in the  
 trial.

of contract and one for the personal services  
 of plaintiff's contract is not sustained by her death  
 that plaintiff's contract is not subject in whole to the plaintiff's

as plaintiff was not entitled to judgment as a  
 matter of law, it will be reversed.











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